

STAFFORD COUNTY BOARD OF ZONING APPEALS MINUTES
May 25, 2010

The regular meeting of the Stafford County Board of Zoning Appeals (BZA) on Tuesday, May 25, 2010, was called to order with the determination of a quorum at 7:00 p.m. by Vice-Chairman Karl D. Larson in the Board of Supervisors Chambers. Dr. Larson introduced the Board members and staff and explained to the public present, the purpose, function and process of the Board of Zoning Appeals. He asked the members of the public who planned to speak at this meeting to please stand and raise their right hand, swearing or affirming to tell the truth.

Mr. Larson stated the Bylaws of this Board state the applicant would be allowed up to ten minutes to state their case, the other speakers would be allowed three minutes to testify, and the applicant would be allowed three minutes for rebuttal.

Members Present: Ernest Ackermann, Ray Davis, Larry Ingalls, Karl D. Larson, Paul Ortiz, Steven Apicella and Heather Stefl

Members Absent: Robert Gibbons and Marty Hudson

Staff Present: Gail Roberts, Deputy County Attorney
Rachel Hudson, Zoning Administrator
Melody Musante, Senior Zoning Technician
Aisha Hamock, Recording Secretary
Andrew McRoberts, Legal Staff to the BZA

Dr. Larson: Are there any changes or additions to the advertised agenda?

Ms. Musante: Mr. Chairman, we have agreed to reverse the order of the agenda and hear item number two first.

Dr. Larson: So, we will hear item number two on the agenda first then we will go to item number one. Before we hear the first case, does any Board member wish to make a declaration or statement concerning any cases to be heard before the Board tonight? Hearing none, I will now ask the secretary to read the first case.

DECLARATIONS OF DISQUALIFICATIONS

None

PUBLIC HEARINGS

1. **A10-3/1000106 - MYRA M. NEVILLE** - Appeal of a Notice of Violation dated March 4, 2010, received March 26, 2010, of Section 28-35, Table 3.1 "District Uses & Standards" regarding the use of a recreational vehicle for the purpose of a temporary dwelling on Assessor's Parcel 42-14-23. The property is zoned A-1, Agricultural, located at 6 Ridgeview Circle, River Ridge Estates Subdivision.

Mrs. Musante: Case A10-3/1000106, applicant, Myra M. Neville, appeal of a Notice of Violation dated March 4, 2010, received March 26, 2010, of Section 28-35, Table 3.1 "District Uses & Standards" regarding the use of a recreational vehicle for the purpose of a temporary dwelling on Assessor's Parcel 42-14-23. The property is zoned A-1, Agricultural, located at 6 Ridgeview Circle, River Ridge Estates Subdivision. You have the application, a copy of the violation dated March 4, 2010, photos of the property, definition of a recreational vehicle, copy of the inspection report, the tax map and vicinity map. Notice of violation certified mail, was sent February 23, 2010 for the use of the recreational vehicle as a residence for the purpose as a temporary dwelling while constructing a single family dwelling. Returned by United States Postal Service undeliverable, no mailbox at this address. Another first notice of violation was sent to a post office box on March 4, 2010. This notice was unclaimed. After two failed attempts, first notice of violation was hand delivered March 26, 2010. Appeal application filed April 27, 2010. Per section 28-25, "definition of specific terms", a recreational vehicle is defined as vehicular, portable structure built on the chassis, designed as a temporary dwelling for travel, recreation and vacation licensed by the Department of Motor Vehicles and is not a listed use for the purpose of the dwelling while constructing a single family dwelling in the A-1, Agricultural, zoning district. Single-family dwelling permit was applied for July 10, 2007 and issued August 15, 2007. Computer tracking system indicates the last inspection was framing on December 28, 2009, which failed.

Dr. Larson: Thank you Melody. Are there any questions for the staff from the board?

Mr. Ackermann: I just have one question. The notice of violation was delivered on March 26, 2010, is that what you said?

Mrs. Musante: Correct. It was hand delivered March 26.

Mr. Ackermann: So, is that when the 30 day starts?

Mrs. Musante: Correct.

Mr. Ackermann: Okay, thank you.

Mr. Ingalls: I have one question, maybe two. Is there any regulation in the County that governs temporary dwellings during the construction?

Mrs. Musante: Currently, no.

Mr. Ingalls: There are currently none. Was there one in the past, did we have an ordinance in the past that addressed the issue?

Mrs. Musante: It was taken out of the ordinance in 1995 and what it stated was "temporary mobile home by special exception, temporary mobile home one year limited during construction of a permanent building".

Mr. Ingalls: But that was removed from the ordinance in 1995?

Mrs. Musante: That was removed in 1995, correct.

Myra M. Neville: Can I say something please? I would like to request the postponement until my lawyer can be here. Not only have they discussed my living arrangements but I am questioning what the ordinance is saying.

Dr. Larson: Excuse me, we will get to you in just a second. We are taking questions.

Ms. Neville: I just want to be sure that it's not to be too late to ask for a postponement.

Dr. Larson: We will get there. Any other questions from the board?

Mr. Apicella: First of all, just to be clear, do they own the property and do they pay taxes on it?

Mrs. Musante: They do own the property.

Mr. Apicella: So, again there is no provision for RVs in the ordinance?

Mrs. Musante: Correct.

Mr. Apicella: Has this issue ever come up before?

Mrs. Musante: Yes.

Mr. Apicella: And what was the disposition?

Mrs. Musante: We currently have violations in the County that we are working on that have people using RVs, travel trailers, as residents and they are under violation.

Mr. Apicella: Have they come before the BZA?

Mrs. Musante: No, not since it was taken out of the ordinance.

Mr. Ingalls: Not since 1995.

Mrs. Musante: Correct.

Mr. Apicella: So it has been a while. Under what conditions may residents have an RV in their yard? I see people who have RV's in their front yards.

Mrs. Musante: You can have recreational vehicles parked on your property as long as they are licensed and tagged. You cannot have them hooked up to electrical poles, hooked into the sewer systems and actually have somebody living in them. They can be parked on your property as long as they're not being occupied.

Mr. Apicella: Are there any other options for the applicant?

Mrs. Musante: They can apply for a conditional use permit for a use not listed.

Mr. Apicella: Or they can move the RV trailer to an RV park?

Mrs. Musante: Correct.

Mr. Apicella: Do we even have an RV park in Stafford?

Mrs. Musante: I do believe we have an RV park in Stafford.

Mrs. Stefl: I have a quick question. So you're telling me that this issue has not come up. So when we had that tornado in 2008 where it knocked out an entire neighborhood and there were RVs down there through FEMA and stuff like that, that was not an issue at that time? I do remember the sheriff department having their FEMA trailers and stuff like that and they stayed there.

Mrs. Musante: Rachel did you hear her question?

Ms. Hudson: I didn't hear the question. I do want to say one thing. The zoning office is complaint-based. We look into complaints only and there was a complaint on this case and that's why we investigated.

Mrs. Stefl: That's what prompted the staff. Thank you.

Dr. Larson: Any other questions for staff? Okay, hearing none, now we will open to public hearing. Will the applicant or her representative please come up and present your case.

Ms. Neville: Hi, I am Myra Neville, I'm the criminal here apparently. I would like to request a postponement because I really feel that I need a lawyer because the zoning administrator notified the Director of Public Works, which is my boss. I work in the Public Works Department as the commercial plan reviewer. He has now put me on paid administrative leave so I am in jeopardy of losing my job if I lose this case. I feel without a doubt that if I could see all the documents, I can prove that in fact when the RV was bought and placed so we could build our home, there was no such verbiage in the ordinance to prevent me from doing such. Today I went to the administrator's office to the clerk to the Board of Supervisors, to go through public information that is supposed to be kept there on-site in that specific room and they did not have the information that I needed. I was able to look at certain ordinance numbers, but when I requested to see certain supplements, like supplement 46, 47 and 48, they did not have it. A section of this very code that they are trying to persecute me by, section 1-10... copies of code and supplements to be available for public inspection. At least one copy of the code and every supplement, thereto shall be kept in the office of the clerk to the Board of Supervisors and shall be there available for public inspection during normal business hours. I went there today, she said there were probably copies in Rachel's office, I did not feel comfortable going to Rachel's office - nothing against you Rachel - because her office is right next door to the department I work in. When I was put on paid administrative leave, it was very obvious that the director Keith Dayton had every intention of firing me and I just want to have time to get a lawyer. I think if I lose this case I will lose my job.

Dr. Larson: Thank you.

Ms. Neville: Thank you.

Mr. Ackermann: Mr. Chairman, do we need a motion for deferral?

Dr. Larson: Yes sir. Is there a motion to postpone?

Gail Roberts: First of all, my name is Gail Roberts, I'm the Deputy County Attorney with the Stafford County Attorney Office and we do not object to any continuance but I would like to address... it was brought to my attention that Ms. Neville was looking for publication number 47. It was brought to my attention at five o'clock tonight. What I believe she is referring to is what we get from Municode, which is the publication we send our ordinances to and they send us our publication 47, the chapters, the pages to delete, and the pages to replace. While I feel that this will no way assist Ms. Neville, we certainly do not have an objection but we certainly did not prevent her from getting anything. She did make this request for any ordinance changes for, I believe, the last three years last week and we suggested the best form would be a FOIA request, which would, had she made it, had to have been replied within five days barring any extension and she did not make that request. Bottom line, we do not object to a continuance.

Dr. Larson: Thank you for the clarification.

Mr. Ingalls: Gail, can I ask you a question? Once the ordinance is redone by municipal code, that supplement is in the code?

Mrs. Roberts: Correct. This is the only thing you have. The pages that they told us to dispose of are disposed of and the pages that they told us to keep are replaced with the ones that they tell us to replace.

Dr. Larson: Ms. Neville, you already requested a postponement, correct?

Ms. Neville: Yes.

Dr. Larson: Either we can proceed with the case now or we can act on a request. Would you like to proceed or act on the request?

Ms. Neville: I would like to request a postponement. One thing that she said that was not the complete truth was that I did try to contact zoning about a FOIA, I would have gone through the normal procedures which would have been five days but she would've requested seven days because of the magnitude of the request. I have a letter stating that, which is the reason why I went there today.

Dr. Larson: Okay, thank you. Since there has been a request to postpone I think we'll close the public hearing now since I would rather have all of the evidence presented at the same hearing with all the people present.

Mrs. Roberts: I will refer to Mr. McRoberts for advice.

Mr. McRoberts: Mr. Chairman, instead of closing the public hearing it ought to be held open and re-advertised, which might be more appropriate.

Mrs. Roberts: Not re-advertised.

Mr. McRoberts: How are people to know when to come?

Mrs. Roberts: If we extended to a date certain tonight, we all know the budgetary constraints. I will obviously refer to your counsel.

Mr. McRoberts: That will be up to the Board of Zoning Appeals. You do wish to hold it open again for next month and not close it, correct?

MOTION:

Dr. Larson: Yes, I do. So we will leave the public hearing open. Is there a motion to postpone this?

Mr. Apicella: So moved.

Mr. Ingalls: We will have the time of the next month's meeting? The June meeting?

Dr. Larson: Let's make it the June meeting. Is there a second?

Mr. Ortiz: Second.

Dr. Larson: All in favor say aye.

Mr. Ackermann: Aye.

Mr. Davis: Aye.

Mr. Hudson: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye.

Mr. Ortiz: Aye.

Mr. Gibbons: Aye. Opposed? Motion carried.

VOTE:

The motion to postpone this case until the June meeting passed 7-0.

Mr. Ackermann – Yes

Mr. Apicella - Yes

Mr. Davis - Yes

Mr. Gibbons – Absent

Mr. Hudson – Absent

Mr. Ingalls - Yes

Dr. Larson - Yes

Mr. Ortiz – Yes

Mrs. Stefl – Yes

1. **V01-10/1000103 - 7-ELEVEN** - Requests a Variance from Stafford County Code, Section 28-35, Table 3.1, "District Uses & Standards", front yard requirement, for an existing convenience store on Assessor's Parcel 21-51A. The property is zoned B-2, Urban Commercial, located at 2998 Jefferson Davis Highway.

Dr. Larson: Okay, I'll ask the secretary read the next case.

Mrs. Musante: Case V01-10/1000103, 7-Eleven, Requests a Variance from Stafford County Code, Section 28-35, Table 3.1, "District Uses and Standards", front yard requirement, for an existing convenience store on Assessor's Parcel 21-51A. The property is zoned B-2, Urban Commercial, located at 2998 Jefferson Davis Highway. You have the application, the application affidavit, owners consent form, conditional use permit dated July 18, 2006, rezoning dated October 18, 2005, sketch, layout, pictures provided by the applicant, dedication and easement plat by RX Associates dated September 14, 2007, site plan dated February 18, 2008, site as built dated October 7, 2009, the tax map and the vicinity map. The applicant is requesting a variance of 6.6 feet for the front yard setback requirement along Jefferson Davis Highway to allow a new existing convenience store to remain. The site is zoned B-2, urban commercial, which requires a front yard setback of forty (40) feet. The 7-Eleven site engineer, Huron Consulting, and land surveyor, Jeff Warren Land Surveying, Inc., was completing the site as built and discovered the building encroaches into the required forty (40) foot front yard setback by 6.6 feet. Per the narrative statement submitted by the applicant, "the encroachment appears to be the result of an error made in 2003 when a survey was performed for a prior owner of the property and the survey monument was established we now believe was in the wrong location based upon the history of the chain of plats recorded in the land records". Please read the details in the submitted narrative statement by the applicant's attorney. The classification for assessor's parcel 21-51 and 21-51A was approved on October 18, 2005. Conditional use permit for vehicle fuel sales was approved on assessor's parcel 21-51A on August 15, 2006. Site plan for convenience store was approved November 6, 2008. Building permit was issued April 6, 2009. Site as built was submitted April 5, 2010. Final certificate of occupancy has not been issued pending the outcome of this variance application. If the variance is approved, the submitted site as built may be approved and the final certificate of occupancy will be issued.

Dr. Larson: Are there any questions for staff?

Mr. Apicella: I have a question for staff. If an individual organization or company relies on plats approved by the County, to what extent should they rely on them?

Mr. Leming: Is that a question for zoning or counsel?

Mr. McRoberts: It sounds like a counsel question.

Mrs. Musante: Please.

Mr. McRoberts: By law every local government employee has limited power to approve things within the scope of their authority and within the law. They do not have the authority to approve something if it's not and likewise folks must at their peril take cognizance of the limitations of the local government employees' authority. In this case, they are relying upon plats that were in error, they were not made in error by County action, they were made in error by surveyor error. The County certainly approved it because on its face that appeared to be correct. I don't think as a legal matter they were entitled to rely upon it is my answer. Certainly when the applicant's counsel comes up I'm sure you'll hear from them but that is my position.

Mr. Apicella: So when the surveys were done in error, to what extent would the applicant in this case have any other way of knowing that their surveys had an error?

Mr. McRoberts: They could have the survey redone, and actual boundaries located. In this case, there were surveys by multiple people but it was still an error.

Mr. Apicella: You're suggesting that they had some responsibility to do their due diligence?

Mr. McRoberts: I think that's what the law is and I've handed out the case Steele versus Fluvanna County Board of Zoning Appeals, which I believe to be on point in which there was an error in the location of the boundary in that case and thus a violation of the setback and some of the same arguments are being made here were made in that case. The Supreme Court held that one, the location of markers on a piece of property was not "a situation or condition of such piece of property within the meaning of the code allowing a variance"; second, the hardship, if any, was self-inflicted because of the placement of the improvements on the property was the responsibility of the property owner, and in this case if there is a lessee you're talking about, it is the responsibility of the lessee before they sign a lease to ensure the viability of the property or if not, probably terminate the lease. And then thirdly, variances can only be granted when there is an application of zoning restrictions that would be constitutionally impermissible and the Cochran case is the most recent one on that point.

Mr. Apicella: And if the applicant's request is denied, what would they then do to fix the problem?

Mr. McRoberts: Well 7-Eleven would need to locate a piece of property that would meet zoning requirements that falls within the setbacks.

Mr. Apicella: It is my understanding that the building has already been constructed.

Mr. McRoberts: That would be an owners issue and not a 7-Eleven problem. In order to conform to the setbacks, the building would have to be moved.

Dr. Larson: Any other questions for staff or counsel? Will the applicant or his or her representative step forward.

Mike Vanderpool: Good evening Mr. Chairman and members of the Board of Zoning Appeals, my name is Mike Vanderpool and I'm representing 7-Eleven. We are at 700 Princess Street in Fredericksburg, Virginia. With me tonight is one of my associates Mr. Paul Gothea, who is an attorney and also a registered engineer and a licensed surveyor and I would ask if the chair would allow me to put exhibits up from time to time and to make the presentation. I would also ask the board's indulgence in granting me additional time, this is a case that developed over the course of several years, has involved five surveyors and involves as you heard significant legal arguments with regard to the matter. I respect the comments that were made by your counsel, we have a different perspective because the law was changed in 2009. The case was decided prior to the amendment of the law and I think there's other distinguishing characteristics which I would like to argue but I don't think I could fit it all into ten minutes even if I talk fast. So I would ask your indulgence in that regard.

Dr. Larson: Please proceed.

Mr. Vanderpool: Thank you Mr. Chairman. As was noted, this case involves the new 7-Eleven on Coachman Drive and 7-Eleven has leased this pad site. They built the building, contrary to a counsel for, the building belongs to 7-Eleven and it would be the responsibility of 7-Eleven to deal with the building. 7-Eleven obtained a special use permit and built a store based upon an approve GDP that is now open as you heard. Exhibit number one shows the general terms, I'm pointing out exhibits that we would be presenting as opposed to attachments to your packet and I would ask Mr. Chairman, just as a matter of order, that all of our exhibits be permitted to the record without further request. Would that be acceptable?

Dr. Larson: That is acceptable.

Mr. Vanderpool: Thank you. This just shows you in general terms, we have a hotel on the site, we have a 7-Eleven store and a gasoline canopy. This shows you the relative position of all of these items. What you will hear tonight is that what really caused the problem is in this location of a hotel site which pushed all of our improvements into what turned out to be the right-of-way, we did not know at the time. The county setback requirements are forty (40) feet, the as built survey in Exhibit two shows that we are approximately thirty three and a half (33 ½) feet from the right-of-way so we are seeking a variance of about six point six (6.6) feet. Now, of course the question comes up what happened? This is what I call a story of five surveyors and the wandering property corner. I think as a matter of law we are entitled to rely on surveyors, we are entitled to rely on surveyors that perform their responsibilities in accordance with applicable law, particularly when it's our surveyor and he has the ability to rely on stakes that are placed in the ground and information provided to him. I'm going to provide an overview and then we will have some witnesses to get in to some level of detail. The story begins in 1948, when Mr. Woolford Wingfield, surveyor, recorded a survey of this particular area which is shown on the screen. It is hard to see on the screen. That survey shows a total right-of-way of eighty (80) feet from Route 1. We are approximately forty (40) feet from center line to our particular property. A second

surveyor appeared on the scene in 2003. That was the survey from ATCS and they prepared a Boundary Line Adjustment (BLA) Plat that was reviewed by the county and recorded among the land records. I believe the state of the law in the Commonwealth of Virginia says that we are entitled to rely on the land records, not necessarily the question of whether it was approved by the County. I understand Council's position that if the county makes a mistake the County is not bound by that and as unfair as that may be, maybe it's a reason for a variance but in this particular case there was reliance upon recorded documents. I think as a matter of law the entire public including surveyors and including 7-Eleven is entitled to rely upon recorded documents. ATCS, in 2003, prepared by BLA plat, which was reviewed by the county and recorded in the land records. That plan showed them the right-of-way as being fifty point seventeen feet (50.17) feet from the center line of the right-of-way, not forty (40) feet in the prior survey that was recorded. That plan also established an angle between the right-of-way in the perpendicular property line of approximately 109 degrees. In 2004, a third surveyor appeared on the scene, Mr. Aubrey Hawkins prepared another BLA plat reviewed by the county and approved and recorded in the land records. He shows the right-of-way as being forty (40) feet not the fifty point seventeen (50.17) feet as shown on the ATCS plat. His plan also shows a different angle for the right-of-way line in the perpendicular line, instead of 109 degrees it is approximately 108 degrees. Particularly significant on this plat, you can see it outlined there on the left hand side, there is the phrase IRS. That stands for in the survey world as iron rod set, however when you look at the plat you can't tell where the rod was set. Based upon our subsequent review and abstraction of what we believe happened here, we think that what happened was that Mr. Hawkins said that pipe at the ATCS corner when he first got on the site and then did not pull it out, or either he set it there to memorialize the fact that there was a discrepancy between what he was doing and what the other surveyor was doing. We don't know for sure what happened but everything that flows forward would indicate that that in fact is what happened, that that rod was set at that particular location. The next year, after this is recorded, he prepares the dedication and easement plat. Now he's going to convey fifteen (15) feet to VDOT. That plat was approved and was recorded in the land records. The angle on that plat is 108 degrees however, there is no evidence that after he made that dedication to move the line down he set an iron rod down at the new point. There is nothing on the plat that says that he did this. So the only iron rod set that we could find up to this point is the one that is set by Aubrey Hawkins we believe on the wrong property corner. The graphic form at this point on the land records, this is what we have as near as we can tell. What you see at the top is the center line of the road. Hawkins says the right-of-way is forty (40) feet. ATCS says its fifty-seven (57) feet. We believe that's the point at which the iron rod was set and then you have Hawkins after its dedication. That is the point of the new corner although no iron pipe was set there. So what happens next, in 2005 RX Associates buys the land and prepares to build a hotel and the pad site on the property and they retain a fourth surveyor, Shadrach and O'Neil. Shadrach and O'Neil stake out the site for the hotel in the pad site and the prepare the dedication plat and they are going to dedicate an additional approximately ten (10) feet. The intent was with that dedication, right next to the fifteen (15) feet that had already been dedicated to VDOT they would come in and take an additional ten (10) feet. However, it appears to us based on the land records and what we now know that when

they went into the field they found a pipe, we believed they assumed that it marked the corner of the dedication that they assumed was the correct point when in fact, it was the ATCS point. The net result of all of that was that the dedication, instead of being side by side in the field, overlapped. So we have the land records telling us they're side by side but when you look at the property monumentation they are not. So it was understandable to us, ATCS, they go out there, they knew Hawkins has dedicated some land, they find a pipe set by Hawkins, they assumed they're on the right corner and it turns out they're not. They apparently used that point and swing the angle of 108 degrees using the Hawkins line. What happened was, there was really an overlap of those two dedications by approximately six (6) feet. Now all of this had the effect of pulling the property line closer to the center line and also rotating the property. What you have here is another graphic representation which shows you have the original forty (40) feet, the fifty-five (55) feet which is the forty-five (45) feet and fifteen (15) feet Hawkins dedication. Then you have the Shadrach ten and a half (10 ½) Foot dedication based upon the ATCS surveying the land records and the pipe that was set and it sets the line at that red location. When in actuality we now know the correct corner is below that we're closer to the store by some six (6) feet because of using the wrong point when they did that. All of these plats are on the land record. Surveyors and property owners have to be able to rely on the land records, there is nothing else to rely on. So, RX Associates starts construction of the hotel and the site improvements, hotel parking lot and all of the infrastructure based on the wrong property corner because their surveyor stakes it out in that fashion. Construction begins and there is mass grading of the site and most of the control points and monuments are lost. At this point the fifth surveyor appears on the scene, Jeff Warner. Mr. Warner arrives to stake out the 7-Eleven and he had two jobs. He was to stake out the 7-Eleven and tie it back to the hotel. In other words, to make sure that the 7-Eleven was in the right location vis-à-vis the hotel. Shadrach and O'Neill says we are on the site, we are going to show you where these property corners are better reflected in the land records, or that one property corner, and we are going to provide you with temporary control points known as travelers points. They give those to Mr. Warner and he uses that to layout the 7-Eleven store and everything matches because relative to the hotel which was actually constructed in the wrong locations, it shifted. So relative to the hotel he was perfectly fine but what happened was the entire site shifted and pulled away from the road. Internally, everything was consistent but based on the information on the landmark or in what was done in the field, it actually had been physically moved. The envelope that was created by this, which is the site plan for the hotel, you can see that box, the pad site. The pad site is basically a hole in the doughnut. We had to fit in that hole in the doughnut. We did not create all the stuff around us but we had to fit within that doughnut that was created by Shadrach based upon the information and the pipes that were out in the field. Unfortunately, it was wrong. Now to complicate matters further, the pavement on Route 1 had been revised, as it's not parallel to the right-of-way. The edge of pavement is not always running exactly at the same angle or the same distance from the right-of-way. So visually if you were not there and looked at it you could not tell, this was not an obvious error that somebody should've been able to pick up. The 7-Eleven store is built according to the stakeout from Warner based upon recorded plats in a land records and based upon the information that he had been given. At this point, Mr. Warner performs an as

built survey and now property corners have been set in the rear of the entire project by the residential developer that is developing in the back. He goes in to try and tie into those points and discovers something doesn't match. He goes across Route 1 and did some additional checking and then determines that in fact we have an encroachment. He also discovers that the hotel and all of the other improvements on the hotel site are not on the ground in the locations shown. But the hotel, because of the rotation, instead of being perpendicular to the side boundary is actually tilted. So all of these improvements now are out of whack even though they are internally consistent with each other, they are out of whack to the true location of the property lines. The net result of all of this is as you can see here, what happened is, everybody thought based upon the recorded documents that the property line was out on that top line and so the building restriction line was the feet (40) foot line that you see designated. Now what we are doing is giving you an overlay that shows is what everyone thought it was. Once the correct corner was determined by Mr. Warner it pulled back, pulled over and rotated and so there, what happens is you can see now the building is in the same spot that it was but by virtue of the air based on the recorded plats the property line is now pulled back into the store. So what happens is, the store was built here based on this its built, everybody is happy until we find out that essentially the lot slid underneath the building and what resulted was the building being across the building restriction line. So this is basically what happened and what really happened here was the building on the adjacent property forced us to build that store at that location because the hotel is under construction, the parking lot is done, the travel ways are done, the streets are done and we are given a hole in the doughnut. We are given plans that say this is where you have to build by the adjacent property. Everything checks out internally so we build it there, so we have a combination of plats that have erroneous information in the land records and then an adjacent property owner who has given us wrong information that has also built his improvements in such a fashion that we are left with only one location for the particular site. Ms. Judy will be testifying shortly from 7-Eleven. She will testify that if you cut six and a half feet off this building, it just flat out does not work. You can use it, it would interfere with the electrical system and they would have to rebuild the whole thing. She will also testify as to the cost to move this site which will exceed one million dollars and in order to comply with our special use permit, if we have to pull this back to be behind the line, we would have to essentially move the whole site back. The canopy, the pumps, the travel ways, everything. But because the hotel is fixed, if we try to move this building back to behind the building restriction line, to put it behind the building restriction line, what happens is we suddenly collapse onto all of the improvements of the hotel. We wipe out travel lanes, we wipe out parking and now the hotel does not have enough parking because we are wiping them out because we are sliding everything back to their property in order to make this happen. So now the hotel doesn't even have enough parking for its rooms. So we don't know what happens to the hotel if we in fact slide everything back at an enormous cost. Let me also say that if we slide it back, it is going to be closer to the residence behind us than it is now. The net effect of sliding it back is everybody loses. The county loses revenue from 7-Eleven, the county loses revenue from the hotel, the hotel is in a terrible state, we are spending a million dollars and at the end of the day, what happens? The pumps, the store and everything is closer to the residence so there are no winners if that is what has to be done. We think that all of that

creates a “extraordinary situation”, which is the language in the ordinance and that due to the situation “the development of the property immediately adjacent to our site”, which is language directly from our statute, which the hotel causes the strict application of the ordinance to unreasonably restrict use of our property. So it is not just the surveying, it is the land records, and it is the development of the immediately adjacent site specifically referenced in the statute. We believe that granting us this Variance would in fact relieve a clearly hardship. That hardship is not shared generally, this is a pretty unique case. In thirty two (32) years, I have not seen anything like this. The Variance is not contrary to the public interest so you can’t tell if it is violating the setback line and there is not substantial detriment to the adjacent property, in fact the Variance is denied, that will cause the hardship to the people behind us. Both the residents as well as the hotel, so there will be substantial detriment to them. We think that the Variance is in order. Let me also say that at this point, I will talk more about it later, very important, in 2009 the law changed. It changed because of a case that our firm handled. We had a Variance that was granted in Fairfax County and the standard at that time in the ordinance was that you have to have a hardship “approaching confiscation”, that is really critical words because in constitutional terms as eluded to by your counsel, if it is “approaching confiscation”, that’s a taking. It is only a taking if you’re deprived of all reasonable use of your property. That’s not the law anymore, in 2009 the law was changed and the legislature in response to a case, where a Variance was granted and the Supreme Court said you can’t grant that Variance because there might be some use of that property. The legislature came back and changed the law and said we are taking out hardship “approaching confiscation”. So you can have a hardship but it no longer needs to approach confiscation. Now what that means is, it takes all constitutional juris prudence that talks about taking and no reasonable use out of the statute. To our knowledge, there is no case that has been decided under the new statute but it clearly was intended to liberalize the standard for just this kind of case. With that Mr. Chairman, I would like to call Sandy Judy as a witness and she was previously sworn at such time as you sworn in the witnesses. Ms. Judy, would you please state your name and address.

Sandra Judy: Sandra S. Judy, 5300 Shawnee Road, Alexandria, VA.

Mr. Vanderpool: And what is your position?

Ms. Judy: Senior Real Estate Representative for 7-Eleven.

Mr. Vanderpool: And are you familiar with the site at Route 1 and Coachman?

Ms. Judy: Yes, I am. I negotiated the real estate deal.

Mr. Vanderpool: And what is the nature of 7-Elevens interest in the project?

Ms. Judy: We have a twenty year ground lease and we invested in the construction of the building and the installation of the gasoline facility and the on site work.

Mr. Vanderpool: Okay, did you retain an engineer and a contractor to assist you?

Ms. Judy: Yes we did.

Mr. Vanderpool: And who were those folks?

Ms. Judy: The engineer was Huron Consulting and what was the other?

Mr. Vanderpool: The contractor?

Ms. Judy: The contractor was Montgomery Development.

Mr. Vanderpool: Okay, and did you rely upon them in good faith to perform those services?

Ms. Judy: Yes we did.

Mr. Vanderpool: And did there come a time when you obtained zoning approval for the property with a Special Use Permit Plan?

Ms. Judy: Yes we did.

Mr. Vanderpool: Okay and when did you first become aware of the setback issue?

Ms. Judy: We were alerted about the issue after we opened the store when Mr. Warner was out doing the as built survey.

Mr. Vanderpool: So you had no knowledge that there were any problems prior to that time in regard to the setback?

Ms. Judy: Absolutely none.

Mr. Vanderpool: To your knowledge, who performed the stake out?

Ms. Judy: Jeff Warner, Surveyor.

Ms. Vanderpool: Okay now would you explain to the BZA the impact of cutting over six (6) feet from the store?

Ms. Judy: It just would not work for our business. We have a prototype store that is laid out to meet disability standards and to carry all of the product line that we have to have in order to have a viable business and to take away that square footage would make the building not usable really.

The electrical panel is on the back of the building so it would really cause a great deal of hardship. We would have to actually reconstruct the building at that point.

Mr. Vanderpool: Do you have an estimate of what it would cost to rebuild this site if we had to pull it back.

Ms. Judy: Yes, I spoke with our construction team and they estimate that it would cost us one point two million to relocate the gas facility and rebuild.

Mr. Vanderpool: Thank you. That is all the questions I have.

Mr. Ackermann: Mr. Chair, can I ask Ms. Judy a question please?

Dr. Larson: Certainly.

Mr. Ackermann: You said you have a twenty year lease on the property?

Ms. Judy: Yes we do.

Mr. Ackermann: So after the twenty years?

Ms. Judy: The building goes to the owner.

Mr. Ackermann: The building goes to the owner? Okay, and then the owner can do whatever the owner wants to do with it?

Ms. Judy: Right.

Mr. Ackermann: Could you refresh my memory again? Who is the owner?

Mr. Vanderpool: RX Associates.

Mr. Ackermann: RX Associates owns the building?

Mr. Vanderpool: They own the land, they currently don't own the building. It is owned by 7-Eleven until such time as the lease expires.

Mr. Ackermann: I see. Okay, so you lease the land from RX Associates? Thank you.

Mr. McRoberts: Mr. Chairman, may I ask a question of the witness?

Dr. Larson: Yes.

Mr. McRoberts: If this problem with the location of monuments had been located before you constructed the building, could this building had been constructed within the donut hole as described by your counsel?

Ms. Judy: I am not a professional engineer. Could the setback have been met?

Mr. Vanderpool: If I could answer that?

Mr. McRoberts: No, I am sorry, I asked the witness.

Mr. Vanderpool: She indicates she is not able to answer the question. Are you able to answer the question?

Ms. Judy: I don't feel confident in answering it.

Mr. Vanderpool: May I answer the question Mr. Chairman? The problem is that the rest of the site was built so the answer is not without destroying the improvements to the hotel.

Mr. McRoberts: Are you testifying?

Mr. Vanderpool: I am under oath sir.

Mr. McRoberts: So there is absolutely no way that this could have been built within the setback?

Mr. Vanderpool: If there had not been any of the problems with the land records, if there had not been any of the problems...

Mr. McRoberts: No, no, no, the condition of my question is if the problem had been located before the building had been constructed and site plan, could it have been put in the right place? In the donut hole?

Mr. Vanderpool: No, because in order to do that, the whole store would have rotated back into the hotel site.

Mr. McRoberts: Actually that is not true. I am talking about the lease hold itself. The hotel is not on your lease hold sir.

Mr. Vanderpool: The hotel is on the lease hold by virtue of the fact there is an heir. Where the actually rear line is of the lease. The lease line originally everybody thought was closer to Route 1 so the hotel built right to that. Now the back lease line is creeping back, so actually what has happened is part of the improvements of the hotel right now are on the lease property from 7-Eleven.

Mr. McRoberts: Okay.

Mr. Ortiz: Say that last piece again.

Mr. Vanderpool: I want to make sure that I am saying this correctly and I will have my other witnesses here testify to this but as I understand what happened was the hotel improvements were actually built closer to Route 1 than what they should have because of this mistake. So what happens now is as the front property line moves back since the square still has the same distance, what happens is the front property line moves back and the rear property line moves back. Right now, we think it's here based on Route 1 so the hotel builds all of its improvements right up to that line. Now what is happening is as a result of the as built we are finding out the whole lot picked up and moved back six and a half feet so actually part of the hotel improvements are located on our property.

Mr. Apicella: By about six and a half feet?

Mr. Vanderpool: Yes sir.

Mr. Ortiz: So that is a fact, you are saying that the hotel property now currently is on the 7-Eleven property based on the new survey.

Mr. Vanderpool: Right so we are going to have to do some adjustment assuming the Variance is granted. If we have to tear it down and rebuild it then we are going to have to evict the hotel from the piece of property that they build on incorrectly so we can rebuild on the property that they are now occupying.

Dr. Larson: But the hotel is to the side of the property.

Mr. Vanderpool: Right, let me if I can put this back up and kind of explain what is happening. Paul if you can kind of point out... If you look at the rear property line of the lease, it comes right up against the parking on the back. Right there. Now, two things happen as a result of the land records, the entire site shifts backwards six and a half feet and also rotates so what happens is our property lines come in and start encroaching on the parking lot of the hotel because it is moving back. Because it is rotating it also encroaches on the fire travel lane between us and the hotel. Now that building is moving down and is wiping out that fire lane. So that fire lane has to be moved, which may cause that parking to be moved and we don't know if there is enough ground left to get enough parking spaces for the hotel once that line is properly established. The development of the adjacent property, which is a specific provision in the code that is a basis for a Variance is exactly what happened here. We did not want this to happen, there are no villains here. We are not saying that any of the surveyors caused this problem, everybody relied on the

land records, everybody relied on the stake outs and it just happened. But the net result is catastrophic to both the hotel and us if the Variance is not granted.

Mr. Ortiz: My other question is based on the survey itself, although there is a number of surveys and a number of dedication of easement plats and many of the surveyors use an existing survey previous to come to some conclusion. What is the legal responsibility of these surveyors and what is the legal aspect to utilizing existing survey points? Now his comment also was that the last surveyor used the points from the property owner, which was Hills of Aquia and those points were in existence for quite a while. So can you please give me a better understanding of the legal puzzle?

Mr. McRoberts: Is this question for me?

Mr. Ortiz: Yes.

Mr. McRoberts: Okay. Certainly a surveyor is customarily going to rely upon the land records before them but that does not mean that it is right. If there is an error found it needs to be corrected and really I think that is what has happened here. It is unfortunate that the error was not found before, if it had been found by the original land owner it could have been corrected then. If it had been found during the development of the hotel it could have been corrected then. It is unfortunate for the 7-Eleven folks that it was found now. I think that the law is pretty clear that erroneously placed markers are not something that they are entitled to rely upon for a Variance. The Steele case holds that directly, the law did not change as a result of the statutory change in that regard whatsoever.

Mr. Ortiz: Well then I have a follow-up question, he comment concerning all reasonable use of the property or some use of that property, in 2009 the law may have been modified based on a previous case. Can you give me your perspective from a legal standpoint?

Mr. McRoberts: Well if you all have seen the statute 15.2-2309, it is a pretty long statute. There is a subsection two of 15.2-2309 that talks about the standards in which a variance may be granted. Two words were removed in 2009 "approaching confiscation", counsel is correct we don't exactly know what the Supreme Court would say about what that meant and what that means but none of the other words were removed and all of these words do have case law by the Virginia Supreme Court telling us exactly what it means. One of them is the fact that an erroneously placed marker is not a "narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property". The Steele versus Fluvanna BZA Case held this specifically, the law did not change as a result of that. Counsel likes to talk about the condition, situation or development of property immediately adjacent thereto and that certainly may be but certainly in the Cochran case, which did predate the statute, it talks about the fact that "if you can avoid the Variance, you do". If

there is a legal means to avoid the Variance, you do, even if it is expensive, even if it is exceedingly expensive, even if it is inconvenient. In this case, it sounds like to me that the hotel needs to lose about six and a half feet of their parking lot, which they built on somebody else's leasehold. It sounds like to me that the 7-Eleven has a pretty good case against the folks that leased them the property. But that is between them and not between them and the Stafford BZA. I would say that again, I don't know exactly what approaching confiscation meant when you took it out that suddenly changes everything so drastically, I think we can agree to disagree on that but what I don't think we can reasonably disagree upon is the fact that the Steele versus Fluvanna specifically held that misplaced and mislocated markers, erroneous survey information is not the type of material that, in the statute, somebody could rely upon for a Variance. The other bit of case law that has not changed in Webber is self imposed hardship. In Steele versus Fluvanna BZA case, they specifically held that in that case that was a self inflicted hardship because, like in this case, they relied to their detriment on misplaced markers, they were told specifically by the property owners association in that case that they could rely upon these markers and in fact they did. Their surveyor was misled, the contractor for the property owner was misled and the poor Steele Family was unfortunately stuck with a house built in the setback. Certainly, from a layman's perspective, that is a hardship and certainly the Steele's had as good a claim as any, we did not do this, we were told that this was exactly what we could do. Their contractor was told he could rely upon, the contractor, in fact did it not the poor Steele's. In this case, 7-Eleven relied to their detriment upon things that the developer had done, the hotel had done and in fact their own people had done but that does not mean that it is not a self inflicted hardship under the case law, which did not change in 2009.

Mr. Vanderpool: Mr. Chairman, if I may respond on several points. First, factually you will hear from the testimony that the monuments in the rear were not set until after the store was built, so he would not have been able to use those in order to determine the problem.

Mr. Ortiz: You are saying that the monuments were not yet set?

Mr. Vanderpool: Yes, that is correct and you will hear that testimony in a moment.

Dr. Larson: How were they set?

Mr. Vanderpool: They were set by the residential developer when he came in and developed those lots.

Dr. Larson: But what were they based on?

Mr. Vanderpool: That I don't know. But they apparently were in the right location from the residential side.

Mr. Ortiz: Just so, case in point, those homes had already been built before 7-Eleven was built.

Mr. Vanderpool: Yes, I think that is the case but I don't think that the monuments were actually set back there but we will get to the testimony on that. Let me speak to this case, there is a critical distinction that counsel has not focused on in this case. In the case he cites, what happened was, somebody walked out there and said well where are the property corners and they said oh, one is between that tree and this tree. Those are the property corners. The Supreme Court said you can't rely on that, you can't rely on somebody walking up to you telling you that the property corners are on this tree and that tree. The distinction here is we relied on the land records and it would be chaos if we cannot rely on the land records. That is a huge distinction between the cases that counsel in fact had cited. Secondly, let me point out again that the statute did not change in this context. The basis for the Variance is quote "development of property immediately adjacent thereto", that is in the ordinance and we can't ignore that language. That is what happened here, the development adjacent hereto pushed us, essentially, because we had to tie into their hole in the donut into the front. I think personally that relying on the land records, relying on surveys going back several years, relying on numerous plats approved by the County, all of those things are enough but even if they are not enough, you have the language in the statute, which says and I am going to read it again for the record "or development of property immediately adjacent thereto". That is there for a reason, the legislature put that phrase there for some purpose and if not this case then what case? If not in this case, then when would you ever have development of the adjacent property that could be a justification for a Variance? I think the legislature said that exactly for this kind of case and they took out the language "approaching confiscation" because what they said was it was too hard grant Variances, essentially. I think that is what the legislature said after the Supreme Court ruled. Mr. Chairman, I would like to continue with bringing evidence into the record.

Dr. Larson: Mr. Vanderpool, how much longer will you be?

Mr. Vanderpool: I have three very quick witnesses and I will go through them very quickly. I suggest maybe not more than ten minutes.

Mr. Apicella: Can I ask a question since you have this slide up? You have indicated that there is going to be domino effect by moving the building both to the hotel and the residents. I get it with respect to the hotel, can you give me a sense of how the residents might be negatively impacted?

Mr. Vanderpool: The gas pumps, the canopy and the store all move closer to the residents. So right now the residents have a distance of, I am going to pick a hypothetical of 100 feet. If everything gets torn down, obviously they will have to go through the whole construction period again but all of the gas pumps and canopy's and everything else are now going to be located six feet closer to the residential property than they are currently. It would not impact them on their

property lines, it is just that they will have a commercial use that is closer to them then they would have as it sits there today.

Mr. Ortiz: Just for clarification, I thought you said previously that if you had to build on the newly surveyed property that you would not be able to place the 7-Eleven type of store in the donut hole?

Mr. Vanderpool: No, if the entire quadrant rotates back, we have the same...

Mr. Ortiz: The entire quadrant is not going to rotate back, we have the hotel that is probably not going to move so make the assumption.

Mr. Vanderpool: If the hotel doesn't move, then we cannot construct. We would have to tear it down and we cannot construct in accordance with the Special Use Permit plat that was approved by the County. Mr. Chairman, if I may, Mr. Warner please. Would you please state your name and address?

Jeffrey Warner: Jeffery Warner, 9442 Centerpoint Lane, Manassas, VA.

Mr. Vanderpool: And your profession?

Mr. Warner: I am a licensed Land Surveyor.

Mr. Vanderpool: Licensed in Virginia?

Mr. Warner: Yes sir.

Mr. Vanderpool: How long?

Mr. Warner: Twenty-three years.

Mr. Vanderpool: Okay and among the services you provide, does that include staking out the buildings?

Mr. Warner: Yes sir.

Mr. Vanderpool: How many buildings have you stacked out in your career?

Mr. Warner: Hundreds.

Mr. Vanderpool: Did there come a time when you were having to do a construction stakeout for 7-Eleven at Route 1, on Coachman Drive?

Mr. Warner: Yes sir.

Mr. Vanderpool: And what was the scope of your work?

Mr. Warner: We were staking out, the original scope in 2006, which was an Alta survey to determine where the points were going to be for 7-Eleven. That was an Alta survey in 2006, we performed a survey and then we were asked to do construction stakeout by Montgomery Development in 2009.

Mr. Vanderpool: And in terms of staking it out were you asked to do anything relative to the existing improvement?

Mr. Warner: Yes, part of our stakeout contract is always what we're dealing with pad sites, to locate the existing improvement, that we're tying into that we are in conformance with the development that's going on next door.

Mr. Vanderpool: Were you provided with any information about the property corners or the travelers points?

Mr. Warner: Yes.

Mr. Vanderpool: Okay, will you explain how you use those?

Mr. Warner: When we first started the Alta survey in 2006 nothing was constructed out there. It was a brand-new site masquerading going on from the hotel site over to the 7-Eleven pad site. Coachman Circle was not built in a subdivision and the back had not even been started. That was then July 2006, we found one property corner in our initial field trip and that was a corner that everyone's talking about on Route 1. Every other corner that Shadrach had set, they had done an Alta survey three months prior to me getting there. On the entire two and half acre parcel, I was only surveying one acre of the two and half acre parcel. I called Shadrach and O'Neal and said what corners do we have? I said I know this is under construction, everything you set out there was probably gone. They had control points, we called the travelers points out on Route 1 and circling the 2 1/2 acres. He sent me that information and we took that information and entered it in. We went back out and found three of those travelers points that were on Route 1 outside of the masquerade. Everything else was gone with the exception of those three points in the one property corner.

Mr. Vanderpool: Okay, now when it came time to do the stakeout, did you utilize that information that was provided by Shadrach based on that corner?

Mr. Warner: Yes.

Mr. Vanderpool: And when you laid it out did it fit inside the envelope as it existed physically?

Mr. Warner: Yes.

Mr. Vanderpool: Okay. Was the store built in the location that you staked out?

Mr. Warner: Yes.

Mr. Vanderpool: And during the as-built survey you determined there was encroachment?

Mr. Warner: Yes sir.

Mr. Vanderpool: And did you use property corners in a rear, in making that determination is that ultimately what were used?

Mr. Warner: Yes sir. At that time Coachman was still under construction, they were building sidewalks and landscaping at the houses in the back were now complete. Those had fresh property corners set on them and the stakes were still there. We saw those and said let's go to the back and locate those and see where we are because we think we have a BRL issue.

Mr. Vanderpool: Okay. Where at this point they were when you did your stakeout?

Mr. Warner: No sir.

Mr. Ortiz: BRL?

Mr. Warner: Building Restriction Line. I'm sorry.

Mr. Vanderpool: And could you determine approximately how much the encroachment was?

Mr. Warner: Yes, six and a half feet (6 1/2).

Mr. Vanderpool: Approximately six point six (6.6). Okay, and did you ultimately determine that the right-of-way line with a different location than what would have been reflected on the plats?

Mr. Warner: Yes, once we found that we had the shift in the property we decided to go across Route 1 and survey the western right-of-way line on Jefferson Davis Hwy. to see if we could then actually build the 80 foot back to see where we were because we were coming from the east and getting a fix and half a overlap. We were relying on property corners of any subdivision so we said let's go across the street and see if we can build an 80 foot right-of-way just to confirm what we found.

Mr. Vanderpool: And yet no knowledge when you did the stakeout that the travelers points and plats were in error?

Mr. Warner: No sir.

Mr. Vanderpool: Based on the facts known to you any explanation that I provided to the Board of Zoning Appeals is an accurate representation?

Mr. Warner: Yes sir.

Mr. Vanderpool: Okay, thank you.

Dr. Larson: Could I ask a question of the witness?

Mr. Vanderpool: Sure.

Mr. Ingalls: Can we ask him some questions?

Mr. Vanderpool: Yes.

Mr. Ingalls: How many points does it take to do a survey on the ground?

Mr. Warner: At least three to mathematically check.

Mr. Ingalls: And how many did you find and use?

Mr. Warner: I had four sir.

Mr. Ingalls: How many?

Mr. Warner: Four.

Mr. Ingalls: You found four property corners?

Mr. Warner: No sir. One property corner and three travelers corners. All the other property corners were gone.

Mr. Ingalls: So you did not attempt to find any other property corners? Somebody had to bring the information for the residential up, you just used travelers points?

Mr. Warner: Other than masquerading there was no staking going on in the subdivision behind. That was a different group that was doing that. There was not any control points. Shadrach had

done the boundary survey, the Alta survey on the piece that I was doing just three months prior. I called Shadrach and O'Neal and said that I'm out here in the field and everything is gone except for one property corner. When we have for control? If they ran a traverse like originally in February of 2006 and he tied all the corners they could to get that property located. They set maybe a dozen or fifteen property corners along with half-acre pad site. They were all gone but tied out there in July. The only thing I had to rely on with their travelers points.

Mr. Ingalls: You said you also did an Alta Survey?

Mr. Warner: Yes sir.

Mr. Ingalls: Alta survey standards are pretty comprehensive.

Mr. Warner: Yes sir.

Mr. Ingalls: And require surveyors to do certain levels of checking.

Mr. Warner: Yes sir.

Mr. Ingalls: And not rely necessarily on travelers points.

Mr. Warner: That's correct but there is nothing up Route 1. We went all the way up to a Aquia Creek.

Mr. Ingalls: Yeah, I don't know maybe you go back someplace but you did not search for nor find other than somebody said I think that is the corner and here's my travelers point and it took off and went from there.

Mr. Warner: No sir that is not really what happened. We tried to survey all those parcels and we have conflicting information between those three boundaries by all the previous surveyors. We have the survey are that is doing the stakeout in the design for the hotel parcel that I'm going to be a pad site to. He send me the information and said he just survey this thing three months ago, here is where the property is, here is my control and here's where the pipe that we set are. Out of that, I go in and occupy all of the control that's left and I checked the only type that's left, I have no reason to believe because there's nothing else I can check to get on his survey to match that hotel site. There is nothing else I can do.

Mr. Ingalls: Again, an Alta survey requires a lot more level and what you've done but that's another story. Is the property, we did not get all the plats they talk about, I don't know why but... I feel like I got half the story. Is the RX Associates plat by Shadrach, is that the shape of the property?

Mr. Warner: That is the shape of the property yes.

Mr. Ingalls: So this property is what we see on that plat. It's like that?

Mr. Warner: Yes sir.

Mr. Ingalls: And, I guess, does it turn, does it slide, is a parallel shift, what happened?

Mr. Warner: It's a slide and a turn.

Mr. Ingalls: I guess this must be a very slight turn, I can't quite read the slide except there with the distance from the 7-Eleven to the existing new right-of-way line there.

Mr. Vanderpool: I apologize for this not being very clear, you can tell that there is a variation on the hotel, there is a rotation I think at that point of approximately 3 feet according to the numbers that are on there. In terms of drifting back toward Route 1, by virtue of the variance there is about 6 1/2 late shift in that.

Mr. Ingalls: Like I said, this one shows the 7-Eleven is almost parallel to the right-of-way. It's within a, again I carry those two numbers, within a half a foot or foot.

Mr. Vanderpool: Of the original right-of-way what happened is when you look at the correct right-of-way it rotates down, the variance, Paul can you put that up?

Mr. Ingalls: What about this one? Is this not a true picture that we are seeing right here?

Mr. Vanderpool: I don't know which are looking at sir.

Mr. Ingalls: The same slide that is that they are. Is that the actual location that you all think it is today? This was not done by... Yeah, this is done by you.

Mr. Warner: Yes sir.

Mr. Ingalls: So this is where you think it is today?

Mr. Warner: Yes sir. That is based on my survey on the west side of Route 1

Mr. Ingalls: How far off from each corner from the right of way is the 7-Eleven, what is the two numbers?

Mr. Vanderpool: Thirty four point forty three (34.43) feet. We have a blowup on one of the exhibits.

Mr. Ingalls: Thirty-four point forty-three (34.43) and thirty-three and forty-four (33.44). It is about a foot difference. So the survey is correct, that is the correct survey, we outline of the property is a correct survey.

Mr. Vanderpool: It is.

Mr. Ingalls: It is a correct survey. That's why they are matches this plat by Mr. Hawkins done 2005. That is the same boundary line as that one so the plats in the record room are maybe correct. There is nothing wrong with that plat, there's nothing wrong with that plat and I have not seen your Alta survey but it's going to look exactly like your all to survey. All those plats looks the same. The plat is not in error.

Mr. Vanderpool: With the exception of the ATCS plat, which is on record.

Mr. Ingalls: With the exception of ATCS plat, okay. But you have plat that is correct and you have that plat that's correct, they are all correct.

Mr. Vanderpool: But the origin of the whole problem was the ATCS plat because what happened was they put the property corner at a different location. So the plat that was the genesis of everything was the ATCS plat.

Mr. Ingalls: I thought I heard you use the term we assume, you think or something to those terms about this mythical point. In one of your slides it showed a concrete monument which I would daresay is probably a VDOT monument that is set up for the original forty (40) foot right-of-way, which would more than likely be close to being correct. They are not always correct. The plat is correct, there is no error in the plat, the error is when somebody said here is the shape and on the go put it on the ground and a set of putting it here they put it over here.

Mr. Vanderpool: Yes.

Mr. Ingalls: There is nothing wrong with the survey. When they went on to say here is where it is they got off somehow ended feeling a one point like Mr. Warner said it takes three property corners to determine where you are on the ground. Otherwise, one doesn't tell you where you are, too definitely where your, it takes at least three property corners to tell us where you are on the ground.

Mr. Vanderpool: Correct and I think what I heard in the testimony sir was that when Shadrach did it they had fourteen (14) or fifteen (15) point and they laid out all of the improvements for the entire site including the hole in the doughnut. To go back, there is clearly a plat on record that is in error, which is the ATCS plat that show the differences being fifty-five (55) feet which

did not agree with the other two plat and that is the point at which it was held. Mr. Warner, did you go back out to see whether there was a rod out there?

Mr. Warner: Yes, that was the original rod.

Mr. Vanderpool: Okay, and had you determined whether the rod was in the wrong location?

Mr. Warner: That is in the wrong location.

Mr. Vanderpool: It wasn't a mythical point he was able to determine, now in hindsight, he was able to determine that the rod was in the wrong location. I agree with you that what happened was everybody... you start with ATCS plat and set the points here. Hawkins sets the pin in the ground which says this is the corner and then everyone is using that pin inappropriately to your point to be able to rotate and locate the square of property relative to it. The origin of the problem was the ATCS plat and we think compounded by the fact that we believe it is circumstantial evidence that the rod that was set as shown on the Aubrey Hawkins Plat was in fact set on the ATCS point. Do you have the Alta survey with you? The Hawkins survey? We see there, it is showing the concrete that was referred to on the corner and then it says IRS but there is no point that shows exactly where that at.

Mr. Warner: We attempted to locate the corner again after the construction of the hotel and we found that I plan on the ground next to a ditch. It was not in the ground, it had been removed. So not finding any of those corners after the hotel construction, that is only moved up into the subdivision.

Mr. Ingalls: When you got there at the site was under the construction from the hotel?

Mr. Warner: The first time in 2006?

Mr. Ingalls: Yes.

Mr. Warner: Yes sir.

Mr. Ingalls: So you found his pipe, which is out of sight under construction and there are times in which contractors had type and knock them out, they pick them up and drive them right in the ground. It drives surveyors bonkers I assume to be able to know, they might drive it really close but let me tell you what really close could be a big error when you go further away.

Mr. Warner: Right.

Mr. Ingalls: To say you found something, the concrete monument was obviously gone.

Mr. Warner: May I respond?

Mr. Ingalls: Yes.

Mr. Warner: If you put up the survey, the dedication for Aubrey Hawkins, what I had was a closed Travelers loop from Shadrach where they had located the iron rod up on Route 1 and they also located the iron rod found at this back point. They had found that prior to construction, they had located that, they had determined this is where the property is. Not based off of one corner but based off of a closed traveler loop required by an Alta boundary survey. They had surveyed the piece and monumented it, so in essence, when you asked me how many points it would take and I said three, at least three geometric points. I did not say we needed three property points and as common practice under a site that's under development, had you called the surveyor that was working on that site, if his property controls gone which happens all the time when we set property corners for subdivisions. They come back and start construction and they all leave town. So if you look at Shadrach...

Mr. Ingalls: I am sure... did he ask you to sign a waiver or agreement?

Mr. Warner: He did not sir.

Mr. Ingalls: He did not?

Mr. Warner: No sir.

Mr. Ingalls: Did you offer?

Mr. Warner: No sir.

Mr. Ingalls: So you did not sign one?

Mr. Warner: I don't offer.

Mr. Ingalls: He just gave you this information and said use it if you want it?

Mr. Warner: Yes sir.

Mr. Ingalls: If you don't...

Mr. Warner: His three travelers points that we set upon and we try to property corner and that property corner was exactly 250.55 feet from the rear corner but he said he found which matches the Hawkins survey. So just because his corner was gone in the back, I did not assume that that type is automatically good until I checked it, it mathematically worked with his closed loop travelers. That type is a fixed position in relation to the rest of the boundary so it wasn't just

haphazard, we confirmed the correct location of that pipe based on his travelers and his original altar survey done just three months prior.

Mr. Ingalls: Did you settle corners in accordance with Alta standards of the property?

Mr. Warner: We did not set the corners because it was all on the structure and we noted that. If you look at the 2006 survey we noted where we got our control from and we noted that the property corner would be set upon completion of final grading and that is allowable under the rules.

Dr. Larson: Mr. Warner if I could ask just a question, I am not a surveyor, I'm assuming travelers points are non-corner points but they are still survey to the same precise standards?

Mr. Warner: Yes sir. Standards one in twenty thousand closure in an urban environment which we would call commercial urban environment, so what we do because you cannot set on every property corner and turn a deed angle, go a distance because of trees and obstructions. We run a closed loop we call a travelers loop, it is a geometrically close figure, we run that either inside or outside the property. Then when we have that good closure on that and everything is a balance travelers, we set up on this control points and start tying all of the boundary corners. We go back in and resolve the boundary so for corners get obliterated then we still have our control points. With the 7-Eleven, we knew that the three control points that we were originally came off of work actually going to be obliterated because the site plan called for a turn lane, restore control over to the West side because that would be the only thing left. We came back two or three years later to actually finish the survey.

Dr. Larson: Okay, I did not mean to interrupt Mr. Ingalls I just wanted to clarify that for my use. I have other questions will turn back to Mr. Ingalls.

Mr. Ingalls: I am finished.

Dr. Larson: Well does any other board member have questions for this witness?

Mr. McRoberts: I have a question. You said that after things started making no sense you went out and did some more surveying and checking. What did you do to do more surveying and checking?

Mr. Warner: When we felt we had a problem with the building restriction line, and the hotel was pretty much to completion. They were finishing up some landscaping and that sort of thing. We said well maybe Shadrach had come back out and staked the property corners. That would be a good check, since we did not have property corners to begin with. So we went out and tried to check the property corners again. Coachman Circle was still under construction, they were pouring sidewalks and the landscapers were there with backhoes digging up all the landscaping

and trees on both sides of Coachman. Those were all hitting in the sidewalk and the poles. We went back to the back of the hotel where originally Shadrach and Aubrey found the iron rod and tried to check that point. Again that was pulled up and was lying on the ground. So at that point I had nothing else to check, we saw that the houses were complete, nice fresh ribbons and stakes on those property corners. We knew from the subdivision plat how that piece (inaudible) of the original plat. How all that banded together. We can go up there in that subdivision with the property markers and work from the subdivision westward to (inaudible).

Mr. McRoberts: Okay and if you had done it before the construction of the 7-Eleven, then you would have discovered the problem then?

Mr. Warner: Correct, but the houses weren't built prior to the construction of the 7-Eleven. Corners were not set. Those houses, everything in that area and everything was under construction.

Mr. McRoberts: Right but you could've located the corners and set them yourself, correct?

Mr. Warner: On the?

Mr. McRoberts: On the property corners of the residential lots?

Mr. Warner: No Sir.

Dr. Larson: If I can interject, I don't mean to put words in your mouth but the property behind you had some reference for their corners. I think he's asking could you have used the same reference to determine your location?

Mr. McRoberts: Correct.

Mr. Warner: The same reference, their traverse points?

Dr. Larson: The property behind you had to have some reference just like you had to have a reference.

Mr. Warner: I am not sure what ATCS used to do the development in the back. My concern was that I had to match the improvements from Shadrach. I never contracted ATCS...I did not know they were doing the development work for the home building.

Mr. Ingalls: So you did not contact ATCS about the traverse to see where they were?

Mr. Warner: No.

Mr. Ortiz: The survey is dated when?

Mr. Warner: My original survey was dated in 2006, dated July 2006 and we did not return to the site until April or May of 2009 when construction had started. We had a contract for Montgomery Development to actually do the stake out.

Mr. McRoberts: Just two questions Mr. Chairman, one is who is responsible for the placement of the improvements on the pad site?

Mr. Warner: Who is responsible? I staked it. I staked the improvements.

Mr. McRoberts: And who did you do the work for?

Mr. Warner: I did the work for Montgomery Development.

Mr. McRoberts: Okay and who were they working for?

Mr. Warner: They were working for 7-Eleven.

Mr. McRoberts: Okay so ultimately you are working through a contractor for 7-Eleven doing the stakeout?

Mr. Warner: Ultimately, yes. The contractors were the developer.

Mr. McRoberts: Okay and you were simply ignorant of the error in the monument, correct?

Mr. Warner: Yes, I did not realize (inaudible).

Mr. McRoberts: Okay, thank you.

Mr. Vanderpool: Mr. Chairman if I may, at the time of the stakeout were the store or the improvements under construction on the adjacent property?

Mr. Warner: Yes.

Mr. Vanderpool: So there was development, let me get the right phrase for the record. There was development of property immediately adjacent thereto?

Mr. Warner: Yes.

Mr. Vanderpool: And your stakeout had to match the development?

Mr. Warner: Yes, we had indicated that before we ever started staking it out.

Mr. Vanderpool: Okay.

Mr. McRoberts: I have a follow-up question to that Mr. Chairman, we've got a six and half a disparity, is that correct?

Mr. Warner: Yes sir.

Mr. McRoberts: Okay, setting aside the issues to the hotel which are obviously not 7-Eleven's direct issues, is there any harm to 7-Eleven if the hotel moves their parking lot six and a half feet back?

Mr. Warner: (Inaudible).

Mr. McRoberts: If the hotel's improvements were not on this pad site?

Mr. Warner: (Inaudible).

Mr. McRoberts: Okay, I'm sorry maybe I'm not being clear.

Mr. Warner: As a surveyor, I am not the engineering side that deals with proffers, setbacks and that sort of thing. I am not sure what the impact is with moving everything.

Mr. McRoberts: Okay, if this error had been noticed before the laying out of the 7-Eleven, in other words if you are not ignorant of the monument problem then you could have staked out properly?

Mr. Warner: No, I could not have.

Mr. McRoberts: Actually, yes you could have, correct?

Mr. Warner: With the site plan for the 7-Eleven.

Mr. McRoberts: It might have overlapped their improvements, correct?

Mr. Warner: Yes. The site would not have worked.

Mr. McRoberts: Okay, so what have overlapped their parking lot slightly, which you were laying at, correct? So in other words, 7-Eleven's improvements would overlap their improvements?

Mr. Warner: Yes sir.

Mr. McRoberts: And so this issue would have had to come to a head and been resolved at the time, correct? Between the developers of the hotel in the developer 7-Eleven, correct?

Mr. Warner: I would assume, yes.

Mr. McRoberts: Okay, thank you.

Mr. Ingalls: Do you know whether the current building is within the variable width storm drainage easement that is along the front and the side? It doesn't tell me how far it's off there, it just says variable width storm drainage easement is between, I'm assuming that the lease for 7-Eleven is just that little square I assume on a plat, I'm not sure what that is.

Mr. Vanderpool: Lets go back to Exhibit 1, Mr. Ingalls is that the one you're referring to? The one he has on the screen?

Mr. Ingalls: Yes, that shows, I don't know where the building is in relation to that. That little blue line that says, if I read correctly, variable width storm drainage easement.

Mr. Warner: I don't believe that the building encroaches into the storm drainage easement, I would have to look at the site plan.

Mr. Ingalls: I guess I was under the impression that the 7-Eleven's lease is that little doughnut hole on the dedication and easement plat done for RX Associates.

Mr. Warner: Yes, that was a lease line.

Mr. Ingalls: At the lease line would be the same as the edge of that storm?

Mr. Warner: No sir. If you see what Paul is pointing to...

Mr. Vanderpool: Excuse me Paul, would you point to that again please.

Mr. Ingalls: So that is 7-Eleven's lease line?

Mr. Warner: Yes.

Mr. Ingalls: Okay, the buildable area that you can build a building in is the little square, correct?

Mr. Warner: Yes sir.

Mr. Ingalls: Inside that, because there's an easement all the way around that little square so the building has to be located inside that square.

Mr. Vanderpool: Yes sir and those easements were a matter of public record.

Mr. Ingalls: But you're not... You don't think you're six feet outside of that easement into the easement? You did an Alta survey you said.

Mr. Warner: I did an Alta survey in 2006.

Mr. Ingalls: What about your as-built survey, does it show where the easement is in the building?

Mr. Warner: If we shift the right-of-way back to where it is shown here, that building will be in that easement.

Mr. Ingalls: So the building is as presently located, the building is within that variable width storm drainage easement by six feet also?

Mr. Warner: No, it is probably two feet.

Mr. Ingalls: Maybe two feet?

Mr. Warner: Yes.

Mr. Ingalls: Okay.

Mr. Vanderpool: And if the building remains we would have to go in and have it adjusted on the site plan.

Dr. Larson: Could I interject one question? We have seen on one of the plans here that the building has to be within a box, you're restricted on four sides. I understand why you're restricted toward the road, I understand that there is a variable easement on either side laterally of the buildings. What restricts the backside, which is actually the front of the building if you approach the 7-Eleven, what restricts that side?

Mr. Vanderpool: There are two things, there is a lease line and then there is also the physical improvements built by the hotel.

Dr. Larson: But the physical improvements by the hotel are either substantially back from that because you have gas pumps, you must have 100 feet.

Mr. Vanderpool: I'm sorry, yes. We were talking about if we move the store under the special use permit, we have to slide everything in relation because we have the store in relation to the canopy in relation to the gas pumps in relation to the travel lane. So under the special use permit plan there are specified distances that we have to maintain. We can't just... If we slide the building and don't slide anything else we would be in violation of zoning.

Dr. Larson: But you could slide the building and everything else and if this is correct the whole property line would slide, correct? So you would slide another six point six feet into the hotel parking lot?

Mr. Vanderpool: Right. And that would wipe out parking for the hotel and the travel lanes and would also wipe out fire lanes. So I don't know...

Mr. Ingalls: Do you have a plan that shows how to do all that? I mean you keep saying that it's going to wipe it out just from looking at it, I don't see how wipes it all out.

Mr. Vanderpool: No, it wipes out a number of the parking spaces and we do have testimony that would be forthcoming once we reach that level. We have testimony on that point that we will be presenting.

Dr. Larson: Any other questions for this witness or Mr. Vanderpool at this point?

Mr. Apicella: Yes, you've mentioned or stated that it's important to rely on recorded documents such as when asked a question about normal and customary business practices as it relates to surveying. It sounds to me like you use previous surveys, is that a normal and customary business practice?

Mr. Warner: Yes.

Mr. Apicella: And did you utilize any land records as any part of your surveying process?

Mr. Warner: Yes.

Mr. Apicella: Would you do anything else to... What would you have done or could you have done differently beyond... Or how would you not utilize the land records to do your surveying? I'm not sure if I'm asking that question the right way but if those documents were entered into the County's records, what other responsibilities would you have beyond relying on those records?

Mr. Warner: Anything that we get whether it's recorded plat, another survey that has not been recorded, we have to verify that information, so just getting the plat we then have to verify that in the field somehow someway. We wouldn't have done anything different in hindsight.

Mr. Apicella: From your vantage point, you relied on the documents and did everything you could to verify the information based on those documents?

Mr. Warner: Yeah, Shadrach survey matched the deed by the County records Aubrey Hawkins survey, their survey matched that. Their dedication plat survey, that all matched. So when I find Shadrach's control, he tells me he found that pipe at that corner and I confirmed that from his control. His plat matches a previously recorded plat by Aubrey, there is nothing else for me to tie on the site. I am pretty well hooked into that.

Mr. Apicella: So help me understand the slippery slope if we could not rely on recorded documents?

Mr. Vanderpool: What would happen if you could not rely on recorded documents, and I am not a surveyor so bear with me here, and there are surveyors in the room that can correct me if I'm wrong, essentially what happens is ultimately you have to go back to... Because if you are not relying on the land records and my understanding is even GPS is not 100 percent accurate to be able to drop a point exactly and drop it within so many feet. Where do you go? You have to go some distance and there are some requirements, as I understand it, about where you go but you have to keep going out and out and out and out. That is certainly, unless you are, something on the record raises your attention to the point of saying gosh there is something going awry here that you would typically, in my understanding is in the surveying industry that you would rely on the recorded plat and rely on the corner markers that are set. If you can't rely on the land records, very frankly I would not know what to rely on. None of us know if we can rely on the land records so there is, I think, the courts have been very clear that in fact that were all entitled to rely on what's recorded in land records. Now the fact again that it was approved by the County, I agree with counsel, the County is not stopped by that but it certainly gives you an imputer of saying I have a plat stamped by a surveyor and stamped by the County and that happened on the ATCS plat as well as the other plats. I don't know what you rely on if you can't rely on the land records. Certainly, I can say from a title perspective and I think that's analogous, as a title, and having done title examinations many years ago, what is in the land records I have to accept unless I have some extrinsic evidence that is brought to my attention that says there's something wrong. I think I'm entitled to rely on those land records as an attorney in the absence of something that says, hey, there's clearly something wrong here.

Mr. Apicella: So it is standard, customary and prudent to rely on those land records, is that what you're saying?

Mr. Vanderpool: That is my, and again I can testify to that, Sir, as to being an attorney...

Mr. Apicella: How about from a surveyor's perspective?

Mr. Warner: It is the only thing we have to rely on. Our rules and regulations for either doing a boundary survey in the Commonwealth of Virginia we have to do are due diligence, research and backup for sixty (60) years on the original parcel, or if it is a new subdivision find the original tract. We rely on land records as our base, unless we find another unrecorded survey by another surveyor, it still holds weight. Every survey starts at the courthouse, I've never performed a survey that my first stop wasn't the courthouse.

Mr. Ingalls: You actually, though the survey that you followed, the Shadrach survey, is that correct, the survey is correct.

Mr. Warner: Correct.

Mr. Ingalls: So you did not rely from my understanding, you do not rely on the survey, that's the shape of the property.

Mr. Warner: That's correct.

Mr. Ingalls: You relied on Shadrach control, you indicated that you didn't have to sign a waiver of agreement that says that Shadrach had normal business practices. Would you have signed it if he asked you to?

Mr. Warner: Sure.

Mr. Ingalls: You would have?

Mr. Warner: Yes.

Mr. Ingalls: But you had taken responsibility that said I accept your traverse as is and am fully responsible for it. You would have signed the document, said that I'm responsible now for this traverse so it's no longer Shadrach's?

Mr. Warner: Okay, when you get that information, you're not just getting a traverse that's floating.

Mr. Ingalls: I know what you're getting.

Mr. Warner: You're getting traverse, coordinates and coordinates on the property that says this is where the traverse is located on the property.

Mr. Ingalls: Normally, you say I'm going to agree with that, you agree that that is correct?

Mr. Warner: Yes.

Mr. Ingalls: Rather than saying that I'm going to go check it, I'm going to go verify, I want to accept it as being what it is. And you accepted what he gave you?

Mr. Warner: In this document we say you're getting that information and to the best of my ability, I am going to go out and check that information and if anything is incorrect we would contact you. That is what the hold harmless agreement across the board says.

Mr. Ingalls: Right.

Dr. Larson: So if I understand this, the plat is correct. The problem was the error in the corner stake location?

Mr. Warner: It is correct. When a plat is plotted on the ground that's incorrect.

Mr. Vanderpool: What caused it to be platted incorrectly was the recorded ATCS plat.

Dr. Larson: How many plats are recorded? We have the ATCS, how many other plats are recorded? Is ATCS on top? I mean is that why that one was selected?

Mr. Vanderpool: They were first in time, so once they said that this was where the point was at it meant Hawkins set a pipe on their point according to their recorded plat that is when everything flowed from that particular point. That point was, as near as we can tell, that point was set where ATCS said the corner was, ATCS was wrong. Therefore the plat, ATCS plat is wrong on its face because it said the right-of-way distances fifty-five (55) feet when both before and after that their plats on record announced a forty (40) feet. That is what led apparently to the placement of the rod at the wrong location, the underlying causation, if the ATCS plat had been correct, we would not be here tonight. But the ATCS plat on the land records was wrong and that is what caused the subsequent actions by five surveyors that got us to where we are tonight.

Dr. Larson: I guess my question is, ATCS plat was wrong, it has a fifty-five (55) foot right-of-way, then on top of those you have other plats that are showing differences?

Mr. Vanderpool: You then have, if I may Mr. Chairman I am going to walk you through that again because it may be helpful now that we've had this long conversation to go back and explain the chronology of what transpired. Paul, would you go back to showing the various points.

Mr. Ingalls: Do you think that could be a simple drafting error of the fifty (50) foot?

Mr. Vanderpool: No, because when you go back and do your analytical analysis of what transpired in this case, everything fits if that's at the wrong point. Now what happened was, let me go back to the one. Paul can help me kind of walk through this. What happened was and

there was a different plat that showed this, the point that is shown that says point used by Shadrach is a plat in the land records by ATCS.

Dr. Larson: One of several plats.

Mr. Vanderpool: Yes. Now what happens is when Aubrey Hawkins comes in he sets the pipe at that point, on the ATCS point.

Mr. Ingalls: Do you know that for sure?

Mr. Vanderpool: I know that by deductive reasoning, I can't tell you for sure but if you go through all the calculations...

Mr. Ingalls: His plat does not indicate, he just does iron rod set, there is not even the little circle. I could not even scale where it is.

Mr. Vanderpool: Exactly.

Mr. Ingalls: It could have been set right beside that concrete monument.

Mr. Vanderpool: Well exactly, however, the only when you go through this and in this case because we don't know exactly where it was set we have to use evidence that indicates what's the case. Now when you go through all the calculations and a backup, the only explanation of what happens is that that pipe was set at that particular location. Now once a pipe is set at that particular location then the other plats come in and say, okay, we know that we're going to be doing dedications and they start using iron pipe that was set in accordance with the ATCS plat to apply all of the subsequent surveys that we used. The procuring cause here is the ATCS point combined with the rod being set there, those are the two things in combination that caused everything else to happen afterwards. And ATCS plan is on record of course as I said. Mr. Chairman I want to make sure you have all the time that you want. Whenever you're ready I'm ready to move on to my next witness.

Dr. Larson: Are there any other questions for this witness for Mr. Vanderpool now?

Mr. Ortiz: I just want a point of clarification, it says here in 2008, 7-Eleven surveyor Jeff Warner reasonably relied on recorded records 2008. 2008, correct?

Mr. Warner: My original survey was done in July of 2006.

Mr. Vanderpool: That was an error in our narrative. I believe he is testifying a date with an error in our narrative, he's testified that it was in 2009.

Dr. Larson: Any other questions?

Mr. Vanderpool: Mr. Chairman, I would like to call Hamilton Palmer. Please state your name and address for the record.

HamiltonPalmer: Hamilton Palmer, 1500 Caroline St., Fredericksburg, VA.

Mr. Vanderpool: What is your occupation?

Mr. Palmer: Land surveyor.

Mr. Vanderpool: And are you licensed in the Commonwealth of Virginia?

Mr. Palmer: Yes.

Mr. Vanderpool: And how long have you been a licensed surveyor?

Mr. Palmer: Since 1988.

Mr. Vanderpool: And approximately how many surveys have you performed?

Mr. Palmer: Several hundred.

Mr. Vanderpool: Okay, and do you also perform stakeout work as part of your service?

Mr. Palmer: Yes I do.

Mr. Vanderpool: Are you familiar with the standards governing surveyors?

Mr. Palmer: Yes I am.

Mr. Vanderpool: Do you have any relationship with Jeff Warner, 7-Eleven or any other party that's been mentioned?

Mr. Palmer: No.

Mr. Vanderpool: Mr. Chairman, I proffer him as an independent expert in the field of surveying based upon his experience. Now you've heard the testimony here today, based upon the testimony you've heard today are you able to formulate an opinion as to whether or not Jeff Warner acted appropriately in accordance with the reasonable survey standards in staking out this particular piece of property?

Mr. Palmer: Two things, one of them and I want to go back to the Alta survey, Alta surveys in 1992, the burden was on the surveyor to do the research and I'm not sure if it was 1999 or 2005 that the Alta survey standards changed and put the burden on the owner to provide you that package. This evening from what I've heard, Mr. Warner relied on the package that was delivered to him during the Alta survey, since there wasn't anything on the ground, he is the package that was given to him to do the Alta survey subsequently he used the information that was provided to him to do the construction stakeout. I would have used the same thing, in my agreements with my clients state that I am able to rely on the information that's provided to me by others.

Mr. Vanderpool: So in your opinion, was that in accordance with the survey standards including those for the Alta?

Mr. Palmer: Yes.

Mr. Vanderpool: Thank you.

Mr. Ingalls: Can I ask him a question?

Mr. Vanderpool: Yes please.

Mr. Ingalls: If you had given him that information, would you have him sign a release form?

Mr. Palmer: Yes.

Mr. Ingalls: And what would that release form would have said?

Mr. Palmer: I don't know exactly, we have one, basically they find something wrong you take ownership of it but if you find something wrong than you to notify me. There is a difference in this one and that is that the information was provided to him through the Alta package in the subsequent standards so there's a difference in there.

Mr. Ingalls: I believe that Shadrach's control data was provided to him. That is something that he sought out.

Mr. Palmer: I don't know.

Mr. Ingalls: That is what I am saying, so don't say that, he did not get that from the Alta title work. He did what you and I would have done.

Mr. Palmer: Yes, he probably did. You know when you're in a tract of land but for now parcel and you have an engineer or developer who develops all around that and gives you this packet, you don't have anything that you need to rely on and when you're asked to do it also survey up

front when it's a pad site, you have to rely on that information and you can rely on that information in its part of the Alta standards that you are able to rely on that information.

Dr. Larson: Any other questions for this witness?

Mr. McRoberts: So as an expert in land surveying in the development process, whose responsibility was the placement of the improvements on the leasehold based upon what you've heard here today?

Mr. Palmer: I would say ultimately it would be 7-Eleven.

Mr. McRoberts: Okay. Next question, if the monument state problem had been determined before the laying out of the 7-Eleven, the 7-Eleven could have been placed within the setbacks correct?

Mr. Palmer: It certainly could have. It may have been in conflict with some of the other improvements, from what I've heard tonight is relative to the hotel and it's precisely on the site with the improvements that were existing.

Mr. McRoberts: I understand. Last question, if the hotel improvements have been removed from the leasehold, it certainly would not have then been in conflict and it could've been laid out within the setback correct?

Mr. Palmer: If the improvements were not on the 7-Eleven or the leasehold parcel, there also improvements on the leasehold parcel but anytime it could've been laid out in accordance if the, using different control from the subdivision in the back, Yes.

Mr. McRoberts: Thank you.

Mr. Ingalls: Can I ask a question?

Mr. Vanderpool: I have a follow-up question.

Mr. Ingalls: The Council has indicated, I think he used the word approved or approved flats by the County several times in his written testimony and his given, that the County improving her right away dedication plat, does that mean anything surveying lines to you?

Mr. Palmer: We would need honor it. It's part of the record yes.

Mr. Ingalls: But they have no responsibility of which are numbers are, is more of a form that you have done this plat correctly.

Mr. Palmer: You are required by state statutes to have said those corners when you do a right away dedication.

Mr. Ingalls: Right. When you do and Alta survey...

Mr. Palmer: Not necessarily, there is a separate item that goes through any check off those and I believe setting the property corners is one of those.

Mr. Ingalls: Okay.

Mr. Vanderpool: I have one further question. Based upon your experience and given the fact that the ATCS plat was recorded as part of the land record, was a reasonable for all of the parties to rely on it?

Mr. Palmer: Yes.

Dr. Larson: Any other questions?

Mr. McRoberts: One last question Mr. Palmer, you're talking as a matter of surveying regulation correct? You're not talking that under the legal standards for variances that somehow there's the right to rely?

Mr. Palmer: That's correct, I am here as a licensed land surveyor.

Mr. McRoberts: Thank you.

Dr. Larson: Any other questions for this witness?

Mr. Vanderpool: Final witness, Jason Azar. Please state your name and address.

Jason Azar: Jason Azar, 2410 Century Blvd., Germantown, MD.

Mr. Vanderpool: And what is your profession?

Mr. Azar: Civil engineer, Director of Engineering for Huron Consulting.

Mr. Vanderpool: Are you familiar with the site at 7-Eleven site at our Route 1 and Coachman Circle.

Mr. Azar: Yes.

Mr. Vanderpool: And what services did Huron Consulting provide in connection with that?

Mr. Azar: We prepared a conditional use permit.

Mr. Vanderpool: And what information did you use from the owner's engineer to design the site?

Mr. Azar: We use the approved site plan for the hotel as well of the information for Mr. Warner survey.

Mr. Vanderpool: And is that what is shown on the screen here?

Mr. Azar: That is actually the site plan for the hotel. That is the basis of the site plan.

Mr. Vanderpool: And so is it fair to say that you design for the hole in the doughnut?

Mr. Azar: Yes.

Mr. Vanderpool: And was the hotel then built?

Mr. Azar: Yes.

Mr. Vanderpool: Based upon the information provided by Mr. Warner, was the hotel built in the location shown on the information provided to you?

Mr. Azar: No.

Mr. Vanderpool: And you have visited the completed site?

Mr. Azar: Yes:

Mr. Vanderpool: Can you visually tell that there is an encroachment?

Mr. Azar: No.

Mr. Vanderpool: Has the 7-Eleven project been built per its approved site plan other than its relationship to Route 1.

Mr. Azar: Yes.

Mr. Vanderpool: And if the 7-Eleven project was rotated back in the building was moved and the pumps were moved in the canopy was moved in the parking was moved and everything was moved back to behind the 40 foot setback line, what impact would that have on the hotel?

Mr. Azar: They would lose, I would estimate eight to twelve parking spaces, the entrances on Route 1 and Coachman Circle would have to be adjusted to align with new travel ways and I would think a portion of the waterline at the hotel homes would have to be relocated as well.

Mr. Vanderpool: I have no further questions.

Mr. Ingalls: Have you done a sketch layout of a what a new layout might look like or are you just surmising?

Mr. Azar: I am just surmising.

Mr. Ingalls: Okay, thank you.

Mr. Vanderpool: You say surmising, did you review this document that's here?

Mr. Azar: Yes I did.

Mr. Vanderpool: And did you know the amount of the setback variance?

Mr. Azar: Yes.

Mr. Vanderpool: And as an engineer, did you visually look at that?

Mr. Azar: Yes.

Mr. Vanderpool: So is it your expert opinion that that would be the amount of parking that would be lost?

Mr. Azar: Yes.

Mr. Vanderpool: And the other adjustments would have to be made?

Mr. Azar: Yes it is.

Mr. McRoberts: I have a couple of questions.

Dr. Larson: Please.

Mr. McRoberts: The question your counsel asked was if you moved everything back six and half feet and the proportion between the pumps in the canopy and the building and everything remained the same, there would certainly be an encroachment on the hotel improvements, is that your testimony?

Mr. Azar: Yes.

Mr. McRoberts: Okay, what if you reduced the space between the canopy and the building by six and half feet?

Mr. Azar: You are suggesting that the canopy does not move.

Mr. McRoberts: I'm saying that if it had been built six and half feet less between the building and the canopy, could have been built that way correct?

Mr. Azar: It would have been in violation of the CUP but yes.

Mr. McRoberts: In violation of excuse me?

Mr. Azar: The conditional use permit for the property.

Mr. McRoberts: In what way?

Mr. Azar: The conditional use permit was proffered, that land was proffered so any deviation from that would be a violation of our conditional use.

Mr. Roberts: Unless you sought to an amendment of that from the County correct?

Mr. Azar: Yes.

Mr. McRoberts: Did you all consider making the request?

Mr. Azar: No.

Mr. McRoberts: You didn't because you did not know about it. You are ignorant of the monuments being driven incorrectly?

Mr. Azar: Yes.

Mr. McRoberts: Who's responsibility is it to place improvements on the leasehold property?

Mr. Azar: It was partially 7-Eleven and partially the hotel. Because it was articulated this evening as to the substantial amount of improvements built on the lease property by the hotel site plan as required i.e. the underground storm water management facility, water service, the ingress and egress travel lanes.

Mr. Roberts: I guess a follow-up question to that is the building itself, that is the issue here because it's violating.

Mr. Azar: The building itself was constructed by 7-Eleven.

Mr. Roberts: Thank you, that is my question.

Mr. Vanderpool: Follow-up question please. Council asked who was responsible for locating the building on the site and you responded 7-Eleven is that correct?

Mr. Azar: Yes.

Mr. Vanderpool: In your opinion, are they entitled to rely on the status of the land records in determining the correct location with those?

Mr. Azar: Yes.

Dr. Larson: Any other questions for this witness?

Mr. McRoberts: I have a follow-up question to that, when you say they are entitled to rely, you're talking about from an engineering perspective or from a serving perspective correct? You're not talking about the law of variance is correct?

Mr. Azar: That's correct.

Mr. McRoberts: Thank you.

Dr. Larson: Any other questions? Okay, we'll take a five-minute recess and come back in 9:10 PM.

Reconvene at 9:10 PM.

Dr. Larson: Mr. Vanderpool, the Board has given you an hour and forty-five minutes...

Mr. Vanderpool: I am very appreciative of that.

Dr. Larson: As opposed to ten.

Mr. Vanderpool: That is very generous.

Dr. Larson: Do you have...

Mr. Vanderpool: Very brief, very brief I would just like to summarize because we have not had a chance to talk about the law specifically in any great detail. Let me start by saying there are no villains here. This is not a situation where any of these surveyors, in my opinion, it was a cavalcade of mistakes and all of them understand there are no villains here in this process. Shadrack and everyone else did what they believe was correct based on the information that was provided to them. The procuring cause of all of this is the ATCS plat on the record showing the wrong location and that set off a whole chain of events. The hotel site, the pad site and the parking are all laid out based upon the wrong location and that was the development of the adjacent property that the code speaks to. Warner and the contractor provided the hole in the doughnut. They tied into all this adjacent development as referred to in the statute. The corner and traverse points were provided to Warner, and he used them appropriately. The only testimony before this Board, is expert independent testimony that says that Mr. Warner was justified in relying on that information that came to him in accordance with the standards for surveys and for staking out properties. Therefore the hardship is not a result of our actions. Mr. Warner acted appropriately under the standards. You have had testimony that the building does not work if it is cut off by six feet. You have also heard testimony, the location of the existing improvements on the adjacent property make it very difficult if not impossible to relocate the 7-Eleven improvements without closing down and causing substantial damage to the adjacent property including the hotel. The hotel is a fixed point, if we smash back in we take away parking spaces and it may very well be that the hotel itself would not meet its requirements for parking or perhaps the hotel would have to lose a floor, because it would not have enough parking for that. I believe that the testimony shows that the site was acquired in good faith. The ATCS error created an extraordinary situation not created by 7-Eleven. The development of the adjacent property fixed the location of what had to be built on the 7-Eleven property and makes the moving of the improvements almost impossible without causing great harm to a number of parties. The hardship...without the variance, the hardship would be created not only for 7-Eleven but also for the adjacent property owners. I believe that what is critically important here...let me also say there is no adverse impact on the community. It is a very unique situation not generally shared. No substantial detriment to the adjacent property to allow the building to remain but removing that building would be devastating to the adjacent property owners. The character of the district is not changed by the granting of the variance. Testimony before you was, no one can even tell there was an encroachment out there. I think it is important here to focus on the fact that the law has changed. The case law dealing with surveyors actually dealt with two points being pointed out by a non-surveyor. In this case 7-Eleven hired a contractor who then in turn hired a surveyor. That surveyor relied upon actions of third parties that created the error. I think there is a distinction there. The law no longer says they have to approach confiscation in order to grant a variance. That is a significant change in the law that obviates almost the entire body of law that existed prior to, in so far as it relates to what constitutes a hardship from a legal standard. Counsel has indicated several times that there is maybe some sort of a distinction that you could rely on the land records for things like deeds, trusts, surveys. But magically you can not rely on the land records for variance. I am aware of no case in Virginia that says you can rely on the land records for deeds, you can rely on the land records

for trusts, you can rely on the land records for all kinds of information, but you can't rely on it for a variance. That strikes me as being highly unusual and I know of no law that says that or no case that has said that. I think this case is exactly why the law was changed by the legislature. What do we have? In essence, no fault, at least from my clients perspective. Secondly, great difficulty in trying to comply. Third, no harm to the public. Fourth, possible destruction of two businesses. Fifth, the county loses tax revenue. Who wins? Who wins if the variance is not granted? What is the public benefit? What is the public good for forcing, tearing down the buildings? Potentially maybe even the hotel in this situation. To achieve what end? The hardship is no longer...the standards is no longer a hardship approaching a constitutional taking. The legislature says very clearly, that is no longer the law. It says the question becomes, under these facts and circumstances, is this the kind of a hardship that the law applies to. I would suggest to you that I believe that it is because the legislature changed the law but they left in the phrase "the development of the adjacent property causes a unique situation", which is clearly what happened here. This testimony with the character of the district will not be changed in any way, so who wins? What is the benefit and what is the detriment on both sides of the equations? You have standards that you must meet, there is no question about that. I would suggest to you that you review the evidence from this podium. You have the surveyor, you have the owner, you have an expert witness to testify the surveyor did things appropriately. No error by the surveyor, which distinguishes from the case council indicated. And you have the testimony by the engineer in terms of the impact on the adjacent property and the impact the adjacent properties had on this. So I believe that for those reasons this case in fact meets the criteria of the revised Ordinance. I am deeply appreciative of your allowing us the time to develop this case. I think it is a difficult case, I knew I was going to have a hard time getting it in very quickly, but I appreciate the fact that you have given us a full airing and we believe applying the appropriate standards does support the granting of a variance in this case. Thank you Mr. Chairman.

Dr. Larson: Any Questions?

Mr. Ingalls: I have one. Mr. Vanderpool, has anybody considered, because part of the problem has been caused by proffer D-2 on this parcel. D is transportation, number 2 is the twelve foot of additional right-of-way for a total of sixty-seven feet, shall be dedicated. Have you considered going back to the County and getting a proffer revision saying how about let us dedicate instead of twelve feet let's dedicate six feet and also proffer that if the county ever needed anything else, the owner would give it, you can't give it. Has anyone tried that?

Mr. Vanderpool: Well we did look at that sir, indirectly. The problem is that there is...I don't know if this came up in the testimony. There is a turn lane that has been built.

Mr. Ingalls: I understand.

Mr. Vanderpool: As part of this. I think that the right-of-way relative to the turn lane and I am going to have to turn now to my engineer and ask this question. Where is the right-of-way relative to that turn lane? Does anybody know?

Mr. Ingalls: I can not hear him, if he wants to come up and testify. He can come up and testify and tell me what he said.

Mr. Azar: The right-of-way line is immediately behind the sidewalk that is existing.

Mr. Ingalls: It is how far behind it?

Mr. Azar: Immediately behind the sidewalk.

Mr. Ingalls: Immediately. One foot, two foot, three foot, an half inch.

Mr. Azar: I don't have the exact, but it is exceptionally close.

Mr. Ingalls: You don't know the exact. It is pretty close to the sidewalk.

Mr. Azar: It is very close.

Mr. Ingalls: Six foot and the sidewalk is probably what a four foot sidewalk?

Mr. Azar: I believe so.

Mr. Ingalls: And it is probably a three or four foot space between the sidewalk and the...it is a five foot sidewalk?

Mr. Azar: I don't think that full green strip was built...

Mr. Ingalls: If it is a five foot sidewalk you could move the right-of-way one foot on the other side of that sidewalk and the turning lane would still be within the dedication?

Mr. Azar: Just barely, yes.

Mr. Ingalls: I would be within...

Mr. Azar: It would appear so. I would have to look at the survey to be exact.

Mr. Ingalls: Thank you.

Mr. Vanderpool: Mr. Ingalls, if you would like, we would be glad to try to get you exact information on that point. I know he is testifying from his memory, but I understand your point. If there is an easier way to do this, we are all for it and we would be glad to see whether or not we can make that happen, if there is any way. Again, there are no villains here; this was not a situation where 7-Eleven wanted to put its building in the wrong location, the hotel didn't want to be in the wrong location, nobody wanted to be here. There's an error. There was an error made. The error was reflected in the land records and here we are. So, again, thank you Mr. Chairman.

Dr. Larson: Is there anybody that wants to speak in support of the applicant, any further support? Is there anyone that wishes to speak in opposition? Okay, we'll close the public hearing. Did you have a suggestion Mr. Ingalls, based on your previous comment?

Mr. Ingalls: I guess I was trying to explore whether all options had been exhausted rather than seeking the variance. A proffer amendment is not a 24-hour turnaround. We might be sixty to ninety days; I think it would probably have to go back to the Planning Commission, back to the Board, public hearings on both, and it's a long process. I just felt like after listening to everything, I felt like maybe that's an option that someone may want to explore, and whether this Board would want to consider delaying action until they've had a chance to explore that. Like I say, it's not going to be something short. I don't know. But I think it's something we can consider unless we think we have enough information before us tonight that maybe that doesn't make any difference to most of us; I don't know.

Mr. Ackermann: Can I ask you a question about that? So changing the proffer would mean everything would stay right where it is?

Mr. Ingalls: Yes, if you change the proffer, the right-of-way line would move. If you just said we're going to dedicate sixty feet instead of sixty-seven total, it would move seven feet away from the building and the building now would meet the setback.

Mr. Ackermann: And it would meet the setback, okay.

Mr. Ingalls: Because where it is, we would be approving a building that is within a drainage easement if we were to approve it where it currently is.

Mr. Ackermann: And that's an approval forever essentially?

Mr. Ingalls: Yeah. Well, he'd have to relocate the drainage easement if that was possible, which is always possible.

Mr. McRoberts: Mr. Chairman, I guess I have a question for staff. Certainly I think that an amendment of the proffer is certainly something that apparently counsel said that they've

considered. I guess you're talking about a public right-of-way. It's not Stafford County's right-of-way, it's the Commonwealth of Virginia's right-of-way because of the primary highway. I guess my question, and maybe I can ask staff, is that something that is possible? I mean, would it not need not just a proffer amendment or a CUP amendment but also a trip to VDOT to get them to vacate the right-of-way or something?

Mrs. Musante: It would. The Commonwealth would have to declare right-of-way surplus. And we actually spoke with Jeff Harvey today, which is the Director of Planning, and he wasn't sure that we, as the County, would be able to support a proffer amendment in this case.

Mr. Ingalls: That's the staff speaking.

Mrs. Musante: Correct. He said they would have to go back to the Commonwealth and it would have to have right-of-way surplus before they would even consider doing a proffer amendment. Now, I can't explain that but that was the discussion.

Mr. Ingalls: I didn't say it would be easy.

Dr. Larson: Let me ask the staff this... if we continued with our due diligence here and came to a conclusion and let's say just hypothetically that it was to deny the variance, if the property owners went through this exercise and got their proffer amendment, then would that mean that the variance denial would be meaningless because it's no longer needed?

Mrs. Musante: That's correct.

Dr. Larson: Thank you. Discussion among the Board? Let's see, first I guess we need a motion.

MOTION:

Mr. Ackermann: Mr. Chair. Just before I make a motion I just want to say I am reluctant to grant a variance because I think we need to maintain the zoning regulations. In this case, I don't see anything special about it. So, therefore, I propose a motion that in this case, and I don't know what the number is or I could say it, that we deny the request for variance.

Dr. Larson: A motion has been made to deny the request for variance. Is there a second?

Mrs. Stefl: I second it.

Dr. Larson: There's been a second. Discussion?

Mr. Ackermann: Mr. Chair, part of my reason for making the motion was that it is an unfortunate situation that the building was built where it was. But the building was not built according to the Zoning Board regulation setback. And the building is currently going to be leased by 7-Eleven for twenty years and after that time, then what situation are we in and what situation might we be in in the future with similar construction issues?

Dr. Larson: Ms. Stefl, did you have any comments?

Mrs. Stefl: No.

Dr. Larson: Any other discussion?

Mr. Ingalls: Mr. Chairman, these are tough cases. It was an error. How it was made we can sit and discuss a long time and we've already done that, but it was an error. I think what counsel said in some ways is true. You and I ride that down that road, nobody in this room, we all know it, but you're not going to say that building is six feet too close. And the good news about the building that I liked was at least the back of it is not... it looks pretty good over there. But this is a tough, tough case, but I also, unfortunately I ready the standards for a variance and excluding the confiscations clause which I know had been taken out and I'm thankful for that, I'm not sure that this case still meets the test for a variance. It's just a very, very unfortunate error and I wish I could figure out a way to support the motion. But I'm having trouble trying to reach the conclusion that we must reach when we read those standards. And, like I say, if somebody can help me with how we can do that, then maybe I would consider it.

Dr. Larson: Any other discussion?

Mr. Apicella: Yes Mr. Chairman. I'm persuaded otherwise. I appreciate the comments that have been made thus far but I do believe that the standards for granting a variance have been articulated and have been, in my view, made. I think, in this particular case, which is a difficult case and interesting one for my first chance at bat here, that if the parties could not rely on the land records, and that's the one issue that really sticks in my mind, what else could they rely on? And, in theory, the land records could be wrong for not just that particular parcel but the other parcels surrounding that property. So, it gets to, again, a very slippery slope where we have to have some basis or the parties in this particular circumstance have to have some basis for making a decision. And so they relied I think in good faith on land records over many years where the property had been platted and showed an incorrect marking and that they would not, on their own accord, have normally been able to figure out that that boundary marker was in error. So, that certainly weighs heavily in my mind. The second point is that I think there is an adverse domino effect not just for the 7-Eleven Company but for the other immediate adjacent parties, namely being the hotel and the residents close to that 7-Eleven. Again, as I think the counsel indicated, who wins, who loses, what's the benefit and what's the detriment? In my

point of view, the detriment of not approving this variance outweighs what I think the benefits are.

Mr. Ackermann: If I may make one more remark sir.

Dr. Larson: Certainly.

Mr. Ackermann: I am going back to the counselors remarks and yours as well. The benefit is that we are interpreting the Zoning Ordinance correctly, I think, or the way that we see the Zoning Ordinance to be stated. I've only been on the Board about three years now and this is the second time, and it's not always, but the second time that this situation has come up in that time. And if we do not uphold the Zoning Ordinance then I think we are getting into a situation of where we are looking at the practice perhaps of recommending an amendment to the Ordinance. And this, I think, doesn't... That is the fourth condition for granting a variance; that the condition should not be one that recommends a change to the Ordinance. That when someone makes a mistake we just let it go that that's okay.

Dr. Larson: Any other comments? I think this is a very unfortunate set of, in Mr. Vanderpool's words, series of mistakes. I think fundamentally the issue was the location of the corner stake and the improper location of that set into motion a series of events that ended up where we are now. So the only... one of the questions I had was cleared up earlier by the Supreme Court of Virginia where they say the mislocation of markers on the property is not a situation or condition of a piece of property within meeting of the Code; which the terms refer to the property itself and it's physical characteristics, not manmade monuments placed on the property. So one of the fundamental things that we look at for variances is, is there a specific issue with the property. And I was scratching my head coming into this meeting thinking are the monuments associated with demarking where property lines are. Are they part of the property? This clearly says no. I also agree with Mr. Vanderpool that there are no winners in this if we deny the variance, but I would hasten to add that sometimes that just happens when you're upholding the law. Any other comments, questions, discussion? Okay, the motion is to deny the variance. All those in favor say aye.

Mr. Ackermann: Aye.

Mr. Davis: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye.

Mr. Ortiz: Aye.

Mr. Stefl: Aye.

Dr. Larson: Opposed?

Mr. Apicella: Nay

Dr. Larson: The motion carries. Any unfinished business?

VOTE:

The motion to deny the Variance passed 6-1.

Mr. Ackermann – Yes

Mr. Apicella – Nay

Mr. Davis – Yes

Mr. Ingalls – Yes

Dr. Larson – Yes

Mr. Ortiz – Yes

Mrs. Stefl – Yes

UNFINISHED BUSINESS

Mr. Ackermann: Are we going to do the by-laws today?

Mrs. Musante: Mr. Larson? Our by-laws have not been... the changes have not been reviewed by our County Attorney's office yet. So we would like to be able to present them to them to look at before you all adopt them.

Dr. Larson: That's fine. I didn't see that on the agenda here. Zoning Administrator's Report?

ZONING ADMINISTRATOR REPORT

Mrs. Musante: There's no report from Rachel tonight. Just to let you know, though, that we have one additional case for the month of June. It is going to be another variance. It's a homeowner coming in for a front property line variance to construct an accessory structure.

Mrs. Stefl: An accessory structure?

Mrs. Musante: Yes ma'am, a barn.

Mr. Ortiz: In June I guess we have four cases then?

Mrs. Musante: We will.

ADOPTION OF MINUTES

1. February 23, 2010

1. March 23, 2010

Dr. Larson: Okay, let's press on to adoption of the minutes. They came in the package. Does anybody have any corrections or additions to the February 23rd minutes? Hearing none, is there a motion to adopt the minutes?

Mr. Ortiz: Motion to adopt.

Dr. Larson: Second?

Mr. Ingalls: Second.

Dr. Larson: Those in favor say aye.

Mr. Ackermann: Aye.

Mr. Apicella: Aye

Mr. Davis: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye.

Mr. Ortiz: Aye.

Mr. Stefl: Aye.

Dr. Larson: Opposed? The motion passes.

VOTE:

The motion to approve the February minutes passed 7-0.

Mr. Ackermann – Yes

Mr. Apicella – Yes

Mr. Davis – Yes

Mr. Ingalls – Yes

Dr. Larson – Yes

Mr. Ortiz – Yes

Mrs. Stefl – Yes

Dr. Larson: The March 23rd minutes; any additions or corrections to those? I have one on page 14, the first Dr. Larson statement where it says “the BZA would like to think the Board of Supervisors”, that would be “thank”. Any other corrections to the March 23rd minutes?

Mrs. Musante: What line was that Mr. Larson?

Dr. Larson: Yes, 644, midline.

Mrs. Musante: Thank you.

Dr. Larson: Any other corrections to those minutes? Is there a motion to adopt?

Mr. Ackermann: Move to adopt.

Dr. Larson: Second?

Mr. Ortiz: Second.

Dr. Larson: Those in favor say aye.

Mr. Ackermann: Aye.

Mr. Apicella: Aye

Mr. Davis: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye.

Mr. Ortiz: Aye.

Mr. Stefl: Aye.

Dr. Larson: Any opposed? Okay.

VOTE:

The motion to approve the March minutes passed 7-0.

Mr. Ackermann – Yes

Mr. Apicella – Yes

Mr. Davis – Yes

Mr. Ingalls – Yes

Dr. Larson – Yes

Mr. Ortiz – Yes

Mrs. Stefl – Yes

OTHER BUSINESS

Okay, other business; by-laws is deferred. And I guess we're adjourned. Thank you everybody, this was a long meeting.

ADJOURNMENT

With no further business the meeting was adjourned at 9:39 P.M.